

86 - 1060

No. _____

Supreme Court, U.S.
FILED

DEC 22 1986

JOSEPH F. SPANIOLO, JR.,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

HEIMBACH, et al.,

Petitioners,

vs.

VILLAGE OF LYONS, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

- I. Does a Court of Appeals commit reversible error constituting action outside the usual course of proceedings when it permits a District Court to completely disregard and act contrary to previous findings of fact supporting grant of injunctive relief for Plaintiff and mandating reversal of grant of previous motion to dismiss, in subsequent grant of summary judgment in Defendants' favor?

- II. Was the Court of Appeals' affirmance of grant of summary judgment where the District Court's decision was not based upon the merits of Defendants' submission, did not even purport to analyze the same, and therefore improperly placed the burden of proof upon non-movant and granted relief in the face of disputed issues of material fact including issues of motive, credi-

bility and intent contrary to previous decisions of this Court so improper, and does it represent a conflict of authority with other Courts of Appeals to the extent of requiring this Court's grant of Certiorari and reversal and remand of the case for trial by jury?

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STATEMENT OF JURISDICTION

Petition for Certiorari to the United States Court of Appeals for the Second Circuit from an order or decree dated and entered September 23, 1986 affirming a judgment of the District Court for the Western District of New York, Telesca, J.

No orders respecting rehearing or granting an extension of time within which to petition for Certiorari have been granted.

The statutory provision believed to confer on this court jurisdiction to review the decree in question by Writ of Certiorari is 28 U.S.C.S. Section 1254 (1).

STATEMENT OF THE CASE

This is a civil rights action filed in October of 1977 by Plaintiffs¹ against Defendants² in the United States District Court in and for the Western District of New York. The gravamen of the complaint was that Defendants had undertaken concerted action under color of law to deprive Plaintiffs of their constitutional rights.³ Upon that basis, Plaintiffs brought an application for Temporary Restraining Order which was granted,⁴ and subsequently extended. On motion to dismiss, the complaint was ruled insufficient as a matter of law,⁵ and Plaintiffs appealed to the United States Court of Appeals for the Second Circuit, which Court reversed the decision below, Heimbach v. Village of Lyons, 597 F. 2d 344, and remanded for further proceedings.

The basic facts of the case are as follows: unbeknownst to the villagers of Lyons, New York, a plan had been decided by members of the Board of Trustees and others, to solicit and obtain federal HUD monies and use the same to demolish the Water-Broad Street Historic District, which had previously been placed upon the National Register of Historic Places, by commissioning a study, passing, applying and enforcing more stringent building codes, declaring them unfit for human habitation, and condemning them without any opportunity for judicial review.⁶ This became clear when, after a survey, which did NOT support a finding of unfitness or suitability for demolition, and after gaining HUD funding on the basis of assurances that such program was for the purpose of rehabilitating the area and would benefit low-income residents, and which were false in many respects, the Village Building Inspector, Louis Salerno, began posting each building and threatening landlord, businessman and tenant alike, with fines, eviction and arrest.⁷

The Citizens Committee to Save Water Street (hereinafter referred to as "CCSWS", or "Plaintiffs") was formed by residents of the area to use peaceful means to protest these actions. Their tactics, which include leafleting, picketing, demonstrations, lawsuits and petitions to the Village Board, were greeted with hostility from members of Village government, who sought to stop their exercise of those rights guaranteed by the First Amendment to the United States Constitution. Defendants, acting under color of office, used threats, coercion, illegal arrests and other forms of intimidation to chill and attempt to chill Plaintiffs' exercise of those rights.⁸ When the reaction of the Village Board to picketing of Board meetings was the arrest of the CCSWS President for conduct that was not illegal under state law, this law suit was filed.⁹

The District Court found, as a matter of law, as witnessed by its injunction against both further criminal prosecution of Plaintiffs and against civil proceedings in furtherance of the application of the code enforcement program of the Village against Plaintiffs, that the use of the laws pursuant to which the said program was allegedly undertaken, was illegal.¹⁰ The factual predicate for such a finding was not contested by the Defendants in the District Court. This became the law of the case; and remained the law of the case after it was remanded to the trial court by the Court of Appeals.¹¹

The matter suffered through six additional years of protracted motion practice on the part of Defendants, and extensive discovery proceedings. On the eve of the trial, Defendants lodged a motion for summary judgment, which was granted in the trial court.¹² Said grant was affirmed on appeal to the Court of Appeals.¹³

ARGUMENT

I. DOES A COURT OF APPEALS COMMIT REVERSIBLE ERROR CONSTITUTING ACTION OUTSIDE THE USUAL COURSE OF PROCEEDINGS WHEN IT PERMITS A DISTRICT COURT TO COMPLETELY DISREGARD AND ACT CONTRARY TO PREVIOUS FINDINGS OF FACT SUPPORTING GRANT OF INJUNCTIVE RELIEF FOR PLAINTIFF AND MANDATING REVERSAL OF GRANT OF PREVIOUS MOTION TO DISMISS IN SUBSEQUENT GRANT OF SUMMARY JUDGMENT IN DEFENDANTS' FAVOR?

The decision and order of Hon. Michael Telesca, U.S.D.J., W.D. of N.Y., Feb. 11, 1986, granting defendants summary judgment based upon partial statement of facts as follows:

"On Oct. 21, 1977 my predecessor, Judge Harold P. Burke, issued an order temporarily restraining defendants from arresting any plaintiffs for being present at 40 Water Street

or for alleged violations of the N.Y. State Building Construction Code or any related provisions of the Village Municipal Code; issuing any arrest warrant or other civil or criminal process which would have the same effect, or which would abridge or threaten the first amendment rights of plaintiffs; or continuing with the criminal proceeding against Mark Heimbach..." (A-15 - A-16)

and holding as follows:

"...At this point I can see no Constitutional violation in plaintiff Heimbach's arrest. On its face the warrant appears to have been properly issued by Justice Perry (who, as the Second Circuit noted, is entitled to immunity from plaintiffs' damage claim). It no longer appears, as alleged in the complaint, that the prosecution was initiated in bad faith, without hope of conviction, to chill the exercise of Mr. Heimbach's First Amendment rights. Heimbach v. Village of Lyons 597 F.2d 344, 347 (2d Cir. 1979). Should the State court determination of pertinent state law present the federal Constitutional issue in a different posture, plaintiff Heimbach is free to commence a separate action alleging a Constitutional violation..." (A-37)

was in error for the reason that the Second Circuit in a prior opinion fixing the law of the case dated April 26, 1979, reversing

dismissal and remanding stated,

"...The complaint alleged that the defendants acted in concert under color of state law so as to prevent, and that they, through a series of harassments and illegal evictions and arrests, effectively did prevent, the plaintiffs from exercising their first amendment rights to freedom of speech, to petition the government for redress of grievances, and to peaceful assembly...They alleged further that the defendant harassed and illegally arrested Mark Heimbach, the Operations Manager of the EFWA and acting President of the CCSWS for a supposed misdemeanor pursuant to a section of the State Building Construction Code which has no provision for criminal penalties and in particular has no penalties applicable to a tenant such as appellant Heimbach. The plaintiffs sought damages and declaratory and injunctive relief... Moreover inasmuch as appellant Heimbach alleged a pattern of harassment and alleged that a criminal prosecution was initiated against him in bad faith without hope of conviction and which resulted in a chill upon the exercise of his sufficient to remove any bar to injunctive interference with state court criminal prosecutions. Younger v. Harris, 401 U.S. 37...Mitchum v. Foster, 407 U.S. 225...

Similarly plaintiffs' allegations of bad faith in the administration of the State Building Construction Code and the zoning ordinances

preclude dismissal of the action against the other village officials on the grounds of a qualified immunity. Accepting the allegations in the complaint as true as we must in our review of the district court's dismissal, the village officials acted neither with a good faith belief in the lawfulness of the actions taken nor with reasonable grounds so to believe. Thus dismissal of the suit against the village officials below was erroneous..." Scheuer v. Rhodes, 416 U.S. 232 at 247-48; Wood v. Strickland, 420 U.S. 308 at 322; Laverne v. Corning, 522 F.2d 1144, 1150 (2d Cir. 1975). 14

The prosecution of a criminal matter in state court will not be enjoined by the federal courts unless the injury threatened was irreparable and great and immediate, or where the state law was flagrantly and patently violative of express constitutional rights, or where, as here, there was bad faith, harassment or other unusual circumstances. Younger v. Harris, *supra*; Mitchum v. Foster, *supra*; Dombrowski v. Pfister, 380 U.S. 479; Wilson v. Thompson, 593 F.2d 1375; Perez v. Ledesma, 401 U.S. 82 (1972).

Accordingly the 1979 Circuit decision,

in sustaining the grant of injunctive relief upon the allegations of the complaint, necessarily found one or more of the above triad of grounds as the Second Circuit's opinion demonstrates, a prima facie showing of bad faith and harassment was made by Plaintiffs. See Pizzolato v. Perez, 524 F. Supp. 914 (ED La. 1981). Judge Telesca's view on this issue must yield to the earlier decision of the United States District Court, the basis for which was set forth at length in the Court of Appeals.

The precise issue, then, becomes whether a court of appeals commits reversible error and strays so far from the acceptable course of proceedings as to mandate this Court's intervention, when it permits a district court to completely disregard, and act contrary to, previous findings of fact supporting the grant of injunctive relief in granting summary judgment for defendant. The Second Circuit found Plaintiffs had shown a prima facie case as required by Younger v. Harris

"...a single prosecution...brought in bad faith or...only one of a series of repeated prosecutions ...[showing] bad faith harassment or other unusual circumstance that would call for equitable relief,

or conduct falling within the dictates of

Perez v. Ledesma, supra, that:

"Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in circumstances where irreparable injury can be shown is federal injunctive relief against pending state prosecution appropriate. 401 U.S. at 85..." See also Dyson v. Stein, 401 U.S. 200; Mitchum v. Foster, supra at 230-231., 16

or

conduct similar to that found in Wilson v.

Thompson⁷ that permits grant of an injunction in circumstances involving:

"...a state prosecution undertaken in retaliation for or to deter the exercise of constitutionally protected rights." 593 F.2d 1375 (5th Cir. 1979), at page 1377.

which findings necessarily precluded the grant of summary judgment by Judge Telesca in February, 1986.

In granting summary judgment on behalf of defendants in this case, the District

Court made findings of fact that were not only incorrect, but contradicted findings made previously by the Court and by the Court of Appeals. The Court also grossly misapplied the law applicable to motions for summary judgment in the federal Courts under the prevailing determinations of this Court and of the Courts of Appeals.

The anomolous situation that has resulted is that the Court of Appeals has permitted, after nine years of active litigation, a case to be denied trial before a jury upon grounds in direct opposition to grounds upon which an injunction was previously granted and grant of a motion to dismiss reversed. It is respectfully submitted that AS A MATTER OF LAW THIS WAS PER SE erroneous; for if judges' minds can differ as to the sufficiency of Plaintiffs' allegations, the matter MUST be entitled to be decided by a Jury.

In their complaint, which was verified, Plaintiffs made the following factual

allegations:

"1. That sometime in 1971, the exact date of which is unknown, the defendants began plans to rearrange the physical and housing structure of down town (sic) Lyons, N.Y. pursuant to a common scheme or plan to remove or render useless low-income dwellings on Water Street in the Village of Lyons and did further enter into a common scheme or plan to drive minorities, poor people from residency on Water Street (sic) or elsewhere in the Village of Lyons.

"2. That commencing on or about July 1, 1977, the defendants, and each of them, and their agents, servants and employees, acting individually and in conspiracy with each other undertook several overt acts in furtherance of the common scheme or plan set forth in par. 1 above.

"3. That on or about July (sic) 2, 1977, the CCSWS was formed to oppose the activities and plans of the defendants by use of information dissemination, picketing, petitioning the appropriate governmental authorities for redress of grievances, peaceful assembly, and other activities specifically protected by the First Amendment of the United States Constitution.

"4. That in furtherance of and pursuant to the common scheme and plan set forth above, the defendants caused the defendant LOUIS A. CALERNO to be appointed as the building

inspector of the defendant VILLAGE OF LYONS and did further, individually and in concert and conspiracy with each other, engage in the following actions and overt acts:

(a) They did authorize, instruct and direct the actions of the said LOUIS A. SALERNO;

(b) They did permit him to act under color of law and clothed with the authority of the defendant VILLAGE OF LYONS;

(c) The said SALERNO did purport to inspect solely buildings on Water Street (sic) in the Village of Lyons, and did purport to find alleged building violations therein;

(d) That the defendant SALERNO did induce, harass, threaten, and intimidate ValchoPekoff to rescind a rental agreement with EFWA and CCSWS on August 17, 1977 whcih (sic) was one day after EFWA and CCSWS had a picket line in the Village of Lyons;

(e) That, as more fully set forth below (sic), the defendant SALERNO did induce, threaten, cajole, harass, intimidate and force Travers (sic) Spencer to attempt to break his lease with EFWA and CCSWS so as to deprive them of an office with which to support the community protest

against the actions of the defendants;

(f) That the Defendant JOHN PERRY (sic), purporting to act as Village Court Justice of the defendant VILLAGE OF LYONS, did issue an arrest warrant for the Plaintiff, HEIMBACH on September 21, 1977 which issuance was not within the power of the judge to so issue. The plaintiff, HEIMBACH was a tenant of premises at 40 Water Street, Lyons, New York which he obtained in his capacity as operations manager for EFWA for the use of both EFWA and CCSWS, pursuant to a lease with Travers Spenser (sic), copy of which is annexed hereto and made a part hereof, dated September 10, 1977. On September 17, 1977, the defendant SALERNO served a notice on the Plaintiff, HEIMBACH, directing him to correct certain alleged deficiencies in the building. A copy of that notice is annexed hereto and made a part hereof. The sections referred to refer to obtaining a certificate of occupancy. No State statute, or municipal statute, or any code, rule or regulation gives to the building inspector the power to direct the tenant to obtain a certificate of occupancy nor is any criminal or civil liability imposed on the tenant for occupying a building where there is no certificate of occupancy. The sections cited

refer solely to obtaining a new certificate of occupancy for the entire building where there has been a change in use of the premises; no change in use had occurred and this was known to the defendants or with the reasonable exercise of due diligence could have become known. That the statutes cited by the defendants do not require that a certificate of occupancy be provided for a portion of a building only. That no existing state or municipal statute provides that a certificate of occupancy be provided for a portion of a building only. That the New York State (sic) Building and Construction Law, the violation of which is given in the warrant of arrest as the basis therefore, provides no criminal penalties for any act, provides no criminal or civil penalties for failure of a tenant to obtain a certificate of occupancy and is not connected with any other state or local statute that requires a tenant to obtain a certificate of occupancy. That the building at 40 Water Street, Lyons, New York, had been in continuous use as a multiple dwelling with a ground floor office like structure for several years and that the entire building had and continued to have a certificate of occupancy. That other violations of similar nature existed in the said premises but

that no other tenants were removed or arrested therefrom, and no criminal informations were filed or warrants issued in connection therewith. That all of the foregoing was known to the defendant PERRY and to the defendants generally. That the defendant PERRY warned HEIMBACH: "We are watching you" and threatened to double the bail each time he entered the building thereafter (after his arrest on September 21, 1977). Thereafter, on September 21, 1977, the defendant SALERNO did intimidate the said Travers Spenser (sic) into signing the criminal information, a copy of which is annexed hereto and made a part hereof. Upon information and belief, the substance of the threat was that if Spenser (sic) did not sign the criminal information, that SALERNO would have Spenser (sic) thrown into jail and fined \$200 per day. That the substance of the criminal information was false in that the plaintiffs had the permission of Spenser (sic) to be upon the premises. The section referred (sic) to in the criminal information refers to erection of firewalls by the owner of property; the defendants knew that the Plaintiffs were merely tenants and not the owner of the property and the criminal information prepared by the defendants so recites. The said JOHN PERRY, as well as all other Village

Court justices lacked legal (criminal) authority to issue a warrant of arrest for a violation by a tenant of the State Building Construction Code; he lacked civil authority to issue a warrant for arrest for the civil provisions of the State Executive Law or the State (sic) Building Construction Code; he knew that no order of the building inspector(sic), the defendant SALERNO had been issued to the tenant and this fact appears from the face of the warrant; he lacked authority to issue a warrant of arrest to a tenant for violation of the zoning ordinance of the defendant VILLAGE where the violator was a tenant and he further knew that HEIMBACH was innocent, and he further lacked this authority were (sic) the criminal information did not charge a violation or the facts from which a violation could fairly be presumed to have occurred;

(g) The Plaintiff, HEIMBACH was arrested and held in jail subject to the rasing (sic) of bail; and

(h) On Saturday, October 15, 1977, the plaintiffs, and also the plaintiff HEIMBACH attempted to re-occupy the premises at 40 Water Street (sic) with the permission and express consent and approval of the landlord, Travers Spenser (sic). At

that time, two policemen, on the direct orders of the defendant, SALERNO did threaten him and several others with arrest unless they left the premises immediately. The police did not have warrant for arrest, no criminal information (s) had been filed, no additional orders or notices had been served on the plaintiffs. Simultaneously therewith, the defendant SALERNO notified Travers Spenser (sic) that the building would not be approved unless the office spece (sic) of EFWA and CCSWS contained two bathrooms, which requirement is not authorized by any STate (sic) or municipal statute, code, rule, ordinance, regulation or custom.

5. That in addition to the acts set forth above, the defendants and each of them, and their agents, servants, and employees have engaged, individually and together, in concert and conspiracy, in conduct which did and was intended to deny to plaintiffs due process of law and equal protection of the laws by the following covert acts:

(a) No hearings were held or notices issued and no applications were made to the State Supreme Court as elsewhere required in the laws of the Village of Lyons;

(b) No attempt was made to inspect, or to equally or thoroughly inspect buildings, houses, dwellings or offices on other areas of the Village of Lyons;

(c) Notices and orders for alleged building code violations have not been issued other than for Water Street (sic) in the Village of Lyons;

(d) Other houses, dwellings and buildings in the Village of Lyons, have, upon information and belief housing violations of the same type and nature as those on Water Street (sic). Upon information and belief, Angeline Salerno owns property at 4-8 Williams Street (sic) in the Village of Lyons. Upon information and belief, the said property does not conform with provision of the New York State (sic) Building Construction Code and the municipal codes of the Village of Lyons which facts are known to defendants. Upon information and belief, the said Angeline Salerno is the mother of the defendant LOUIS A. SALERNO. Upon information and belief, the said Angeline Salerno has not been issued a citation, notice, order, or charged criminally with regard to numerous violations in her property, and upon information and belief, other owners of properties also having similar known violations have not been charged, ordered or notified in connection therewith.

6. That the plaintiffs and each of them were and are engaged in a common and concerted effort to oppose the said illegal and improper (sic) activities of the defendants, and to

induce the elected officials and other citizens of the Village (sic) of Lyons not to engage in activities which would have the effect of driving minorities, poor people, blacks, migrants and Spanish-speaking people from residency in the Village of Lyons...

10. That the defendants, and each of them, and their agents, servants and employees were purporting to act in official capacities or otherwise pursuant to or authorized by the laws of the state of New York and of the Village of Lyons, or in accordance with the custom and usages of the Village of Lyons and State of New York.

11. That the actions of the defendants did and were intended to harass, annoy, frighten and intimidate the plaintiffs into not exercising their constitutional rights and prevent them protesting the actions of defedents (sic). That any prosecutions undertaken were undertaken in bad faith and not for the purpose of obtaining a valid conviction.

12. That by reason of preventing the plaintiffs from using their office, the plaintiffs are prevented from rendering support to the community and are denied access to files, documents and other materials needed to crystallize public opinion against the actions of the defendants and the members of the community are denied access to certain materials, including food and clothing, which has been collected for their benefit.

In this action, brought pursuant to the provisions of 42 U.S.C. §§ 1983 and 1985, only three elements were required to be proved by Plaintiffs: (1) that they had been denied their constitutional rights or other rights guaranteed to them by federal law; and (2) that such denial was made under color of law, statute, ordinance, regulation or custom of the state (1983); and (3) that such action was undertaken by two or more persons in conspiracy for the purpose of impeding, hindering, obstructing or defeating the due course of justice in any state with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws. Most of the last of these criteria goes to the issue of Defendants' intent.

It was on the basis that Plaintiffs had substantially proven prima facie each of these

three elements, that the Court of Appeals reversed the dismissal of the action and remanded the same for trial in the District Court.

The doctrine of "Law of the Case" is a discretionary rule of practice, based upon sound policy that when an issue is litigated and decided, that should be the end of the matter. United States v. United States Smelting, Refining and Mineral Co., 339 U.S. 186, reh den, 339 U.S. 972 (1950); Fontainebleau Hotel Corp. v. Crossman, 286 F. 2d 926, 928 (5th Cir. 1961).

Generally a decision by the Court on a point in the case becomes the law of the case unless or until it is reversed or modified by a higher court. Denton v. Ellis, 258 F. Supp. 223 (EDNC 1966).

However, the Court retains the power to disregard it, but only where the initial ruling was plainly wrong or where its application would work a manifest injustice. Ray Laine Worsteds, Inc. v. United States, 146 F. Supp. 723 (Ct. Cl. 1956). Some good reason must be shown why the

prior ruling is no longer applicable or should not be followed, in order to justify a departure therefrom. See, 1 Moore's Federal Practice, ¶ 4.04[1] at pp. 4201, 4204 (2d Ed. 1961).

"A decision of a legal issue or issues by an appellate court establishes the 'law of the case' and must be followed in all subsequent proceedings in the same case in the trial court or on a later appeal in the appellate court, unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of law applicable to such issues, or the decision was clearly erroneous or would work a manifest injustice." White v. Murtha, 377 F. 2d 428 (5th Cir. 1967), citing Lincoln National Life Ins. Co. v. Roosth, 306 F. 2d 110, 113; Chicago, St. Paul, M. & O. Ry. Co. v. Rulp, 102 F. 2d 352, 354.

The usual rule is that "a mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal." Foley v. Smith, 437 F. 2d 115, 116 (5th Cir. 1971). Likewise, the Fifth Circuit has adopted the view that "whatever was before the appellate Court and disposed of by the decree is considered

as finally settled and becomes the law of the case." In re United States, 207 F. 2d 567, 570 (5th Cir. 1953).

"There would be no end to suits if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions on speculation of chances of changes in its members." Roberts v. Cooper, 20 How., 61 U.S. 467, 481, 15 L. Ed 969.

The Court of Appeals in this case departed from the compelling practice of these precedents in applying the doctrine of the law of the case, and it is respectfully submitted that its actions were so clearly without the bounds of accepted practice, not to mention reason, as to require this Court to exercise its Certiorari power and reverse and remand the case to the District Court.

II. WAS THE COURT OF APPEALS' AFFIRMANCE OF GRANT OF SUMMARY JUDGMENT WHERE THE DISTRICT COURT'S DECISION WAS NOT BASED UPON THE MERITS OF DEFENDANTS' SUBMISSION, DID NOT EVEN PURPORT TO ANALYZE THE SAME, AND THEREFORE IMPROPERLY PLACED THE BURDEN OF PROOF UPON NON-MOVANT AND GRANTED RELIEF IN THE FACE OF DISPUTED ISSUES OF MATERIAL FACT INCLUDING ISSUES OF MOTIVE, CREDIBILITY AND INTENT CONTRARY TO PREVIOUS DECISIONS OF THIS COURT SO IMPROPER, AND DOES IT REPRESENT A CONFLICT OF AUTHORITY WITH OTHER COURTS OF APPEALS TO THE EXTENT OF REQUIRING THIS COURT'S GRANT OF CERTIORARI AND REVERSAL AND REMAND OF THE CASE FOR TRIAL BY JURY?

Aside from the allegations of the complaint, reproduced, supra, which were both specifically factual and verified, made upon

personal knowledge, and therefore admissible in opposition to motion for summary judgment, Gordon v. Watson, 622 F. 2d 120 -- a substantial volume of documentary proof, received in discovery and authenticated by Plaintiff's counsel, of which the authenticity was not denied by the defendants, and actually considered by the court below, was advanced in opposition to Defendant's motion for summary judgment. Such material was properly before the Court. FDIC v. Lauterbach, 626 F. 2d 1327; Mitchell v. Babouef 581 F. 2d 412 reh den 586 F 2d 842, cert den, 441 US 966,; Quinn v. Syracuse Model Neighborhood Corp., 613 F. 2d 438 (2d Cir. 1980) Plaintiff Heimach also testified at deposition and had previously submitted affidavits of substance before the District Court.

It was the averments contained in the complaint that were sustained by the Court of Appeals as sufficient to state a proper claim for relief by its opinion in 1979.

See, Heimbach v. Lyons, 597 F. 2d 344 (2d Cir. 1979) reproduced in full at A-1 - A-7.

There appears to be no question that the Defendants, in undertaking the actions complained of, were acting under color of law and in their official capacities as Village Building Inspector, Village Judge, Village Police Chief, Village Mayor, Member of the Village Board of Trustees, Village Attorney, etc.

In his deposition, which was taken by Defendants, Plaintiff Heimbach testified that he never had any trouble with his first landlord in Lyons until the day after the first time CCSWS engaged in informational picketing at a Village Board meeting, at which time Mr. Salerno inspected that premises and his landlord immediately thereafter informed him he would have to vacate the premises. He testified that his organization subsequently moved their office to 40 Water Street pursuant to lease, signed Sept. 19, 1977; that they entered with the

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the landlord's permission; that the landlord had given him the key. The Village's own records showed the landlord to be a CCSWS member and spokesman. Mr. Heimbach swore that the premises were used as an office, that CCSWS picketed every Village Board meeting after August 16, 1977, and picketed the Department of Social Services every day, 5 days a week beginning in late August of that year; that the activities related to redress against dislocation of landlords, tenants, and businesses in the Water Street area and detrimental effect of the Village's Code Enforcement Program on their incomes and the standard and quality of their lives.

Mr. Heimbach testified that on September 19, 1977, there was a Village Board meeting on the subject, that there was picketing; that the defendants were concerned; that subsequent to that the building inspector and others locked the premises and wouldn't let the Plaintiffs back in; that Mr. Spencer,

who was coerced into signing an affidavit to permit Mr. Heimbach's arrest, changed his mind and gave him a key and permission to re-enter; that Judge Perry warned him if Mr. Heimbach reentered the judge would double his bail; that he did return and was forced out by police under orders of the building inspector as part of an executive "injunction" against occupancy that lasted until the District Court issued its restraining order. Thereafter the Village officials refused to discuss matters affecting Water Street with CCSWS representatives. It is uncontroverted that this state of denial of recourse to the government continued both before and after this lawsuit, allegedly (on the part of Defendants) because of this law suit, and in the face of HUD directives to the contrary and HUD directives to remedy the hiring practices in relation to minorities.

There appears to be little question that a genuine issue of material fact was

raised by Plaintiffs at the very least, in relation to the following: that defendants engaged in illegal conduct for the purpose of preventing Plaintiffs from exercising their First Amendment rights of speech, assembly, association and petition, and in furtherance of discrimination against the people living in the area. The Village had reported to HUD that the area in question was not predominantly minority when it was overwhelmingly so; and in spite of their promises, it is clear that only two minority persons were ever hired in the program, and one was previously a municipal employee; no affirmative action program existed (this was all supported by Village records); furthermore, the Village, after the resignation of Mr. Fabino, refused to even talk to the Plaintiffs, and blamed that on Plaintiffs' attempts to seek judicial recourse, even before such recourse was attempted (this was supported by Defendants' letters and

affidavits below). Plaintiff CCSWS' spokes-
persons were thereafter refused the right to
submit matters to agenda or speak at Village
Board meetings which were open to the public
by Mayor Dashney (according to Plaintiff's
testimony at deposition); further, even after
HUD ordered the Village to sit down and settle
its differences with CCSWS, as representative
of the people in the District, the Board re-
fused to do so; in fact, the HUD letter con-
taining the said order was never even shown
to Plaintiffs until it was discovered in the
course of these proceedings pursuant to
Rule 34, F.R.C.P.; meanwhile, the illegality
of Mr. Heimbach's arrest and the lack of ju-
risdiction and the unprecedented nature of
the same stands uncontroverted and incontra-
vertible. It was on that basis that injunc-
tive relief in this case was granted.¹⁸

Defendants' affidavits did nothing more
than raise factual issues as to whether Mr.
Heimbach was acting in derogation of some
legal requirement, whether or not his landlords

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had been coerced or frightened by Village officials who are Defendants herein, whether a conspiracy existed and whether or not the Defendants had acted in bad faith.¹⁹ Defendants' affidavits did not controvert most of the contents of Plaintiff's deposition testimony, the complaint or Plaintiffs' documentary submissions. The District Court clearly applied the wrong standard on motion for summary judgment. The correct standard requires denial based upon review of all the evidence, 6 Moore's Federal Practice ¶56.27[1] at 56-1555 (2d Ed. 1980) unless, after subjecting defendants' evidence to a critical eye and drawing every reasonable inference in Plaintiffs' favor, Ambook Enterprises v. Time, Inc., 612 F. 2d 604, 611 (2d Cir. 1979), cert. dismissed, U.S. , 101 S. Ct. 35, 65 L. Ed. 2d 1179 (1980); see Continental Co. v. Union Carbide and Carbon Corp., 370 U.S. 690, 696; the Plaintiffs' case remains devoid "of any significant probative evidence tending to support

the complaint", Ambook Enterprises v. Time, Inc., supra, citing First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290 (1968).

In this respect it is clear that the grant of summary judgment below was improper because it tried those issues on the basis of affidavits -- setting Mr. Heimbach's testimonial circumstantial evidence of conspiracy against the Defendants' blanket denials by affidavit; setting his claim of bad faith against their claim of good faith; setting their claim of bona fide enforcement against his claim of illegal action under color of law in furtherance of a discriminatory and unconstitutional purpose -- these matters were all highly uncertain, disputed issues of material fact, which the District Court was mandated to try before a jury.²⁰

No affidavit by either of Plaintiffs' landlords was submitted by Defendants, yet the District Court charged that failure to Plaintiffs in contravention of the settled

law of summary judgment. Adickes v. S.H. Kress, 398 U.S. 144 (1969).²¹ It is a matter of first principle where summary judgment is concerned, that the movant owns the burden of showing the absence of any genuine issue of material fact. Adickes v. Kress, supra at 153. See, Celotex Corp. v. Catrett, 407 U.S. _____, 91 L. Ed 2d 265 at 278.

In the Adickes case, this Court had no difficulty ruling summary judgment was improper on the basis of the factual allegations of non-movants' (Plaintiffs') complaint, coupled with movant's affidavits and depositions. id. This does not require non-movant to submit affidavits in opposition to the motion. id., at 160-1; Advisory Committee Notes to 1963 Amendments to F.R.C.P. 56(e): "Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented."

Moreover, in their affidavitted denials

of coercive acts, bad faith, conspiracy, the Defendants placed their credibility directly in issue, requiring trial on the merits of the dispute..

It is settled that summary judgment under Rule 56 should not be rendered where there is a genuine issue of material fact; i.e., a genuine dispute of fact on a material issue. Associated Press v. United States, 326 U.S. 1, reh den, 326 U.S. 304 (1945).

The Defendants, in their motion, took great pains to deny any conspiracy among them or hard proof of same by Plaintiffs. The existence or non-existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide. As a member of this Court once noted, in words applicable here,

"In this case petitioner[s] may have had to prove [their] case by impeaching the [Village's] witnesses and appealing to the jury to disbelieve all that they said was true in the affidavits. The right to confront, cross-examine and impeach adverse wit-

nesses is one of the most fundamental rights sought to be preserved by the Seventh Amendment provision for jury trials in civil cases. The advantages of trial before a live jury with live witnesses, and all the possibilities of considering the human factors, should not be eliminated by substituting trial by affidavit and the sterile bareness of summary judgment.

'It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even-handed justice" ' Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962)". Adickes v. Kress, supra, at 176, Black, J., concurring.

See, United States v. United Scenic Artists Local, etc., 27 F.R.D. 499 (DCNY 1961).

Summary judgment pursuant to Rule 56, F.R.C.P., is ordinarily not a proper vehicle for resolution of disputes concerning state of mind and interpretations of perceived events, Schmidt v. McKay, 555 F. 2d 30 (2d Cir. 1977), or intent, Vaughan v. Teledyne, 628 F. 2d 1214; see Friedman v. Meyers, 482 F. 2d 435 (2d Cir. 1973).

This Court has held that Rule 56 relating to summary judgments should be cautiously invoked to the end that parties may always be afforded trial where there is bona fide dispute of facts between them, Associated Press v. United States, supra, because the purpose of the rule is not to cut litigants off from their right to trial by jury if they really have issues to try. Poller v. Columbia Broadcasting System, Inc., supra; Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, reh den, 322 U.S. 767 (1944). In fact, where Defendants' credibility is crucial, summary judgment becomes improper and trial indispensable; it will not do to say that, since a Plaintiff opposing a motion has offered nothing by his affidavits which discredits the honesty of defendants, the latter's deposition must be accepted as true, Arnstein v. Porter, 154 F. 2d 464 (2d Cir. 1946). This is especially true where, as in this case, Plaintiffs have expressly challenged the honesty of Defendants

and directly contradicted their protestations of innocence. See Colby v. Kourne, 178 F. 2d 872 (2d Cir. 1949); Cross v. United States, 336 F. 2d 431 (2d Cir. 1964); Sartor v. Arkansas Natural Gas Corp, supra.

The courts have consistently held that, upon a motion made under Rule 56, it is not the court's function to pass upon the credibility of statements contained in affidavits, or to draw inferences in favor of one party at the expense of the other where more than one inference is possible; the decision does not depend upon the number of affidavits one party may submit as compared to the other, and the court's conviction as to the merits of the case is also immaterial. Buren v. Schein, 32 F.R.D. 218 (DCNY 1963).

That is what was done in this case. On the basis of affidavits which stated that all acts alleged were undertaken for a proper purpose, and that no coercion, conspiracy or other improper conduct took place, the District Court ignored the permissible inference from the

facts alleged in Plaintiff's deposition, his verified complaint, his affidavits and which were supported by documentary evidence furnished by Defendants, that an illegal deprivation of constitutional rights of Plaintiffs was committed by Defendants under color of law.

In the case at bar, and as the Court of Appeals initially properly held, the evidence was certainly capable of sustaining an inference of Defendants' guilt. In such a case, grant of summary judgment in favor of Defendants is improper. United States v. Diebold, Inc., 369 U.S. 654 (1962); United States v. Perry, 431 F. 2d 1020.

A review of the District Court's opinion clearly shows that the most fundamental rules relating to the decision of a motion for summary judgment were not followed in fact. Nowhere does an analysis appear of how defendants showed the absence of a genuine issue of material fact, which is their burden. F.R.C.P. 56; Adickes v. Kress, supra; Celo-

tex Corp. v. Catrett, supra. Moreover, the District Court's statement of the facts is incorrect in basic particulars, misidentifying landlords as tenants, etc. making issues where none exist where no dispute was raised by either party on those subjects.

The District Court clearly did not construe the evidence in its most favorable light in favor of the party opposing the motion and against the movant,²² it did not closely scrutinize the movant's papers -- it never mentions them in its opinion. Nor are Plaintiffs opposing papers indulgently treated, John Aluminum and Brass Corp. v. Storm King Corp., 303 F. 2d 425; Tee-Pak, Inc. v. St. Regis Paper Co., 491 F. 2d 1193 (6th Cir. 1974), nor is the earlier record, replete with factual averments and factual findings and conclusions of law, even adverted to. It is clear the court never considered it.

Under circumstances such as these, where Defendants have not shown the absence of a genuine issue of material fact, and the Courts have not required them to, Plaintiffs were not even required to submit opposing affidavits, and the grant of summary judgment was grossly improper. United States v. Pent-R-Books, 538 F. 2d 519 (2d Cir.), cert den, 430 U.S. 906; Adickes v. Kress, supra; Mutual Fund Investors, Inc. v. Putnam Management Co., 553 F. 2d 620.

Summary judgment is a remedy for cases where the proof is clear and simple. See, e.g., Celotex Corp. v. Catrett, supra; in a case of this complexity, where Judges have disagreed, and where this Judge clearly did not understand the case in toto, the Judge should not have, for reasons unstated in his opinion, without identifying the issues and the evidence upon which he found an absence of any genuine dispute, have been permitted to grant summary judgment in Defendants' favor. Such conduct is demonstrably erroneous and represents an abuse of discretion.

CONCLUSION

For the reasons stated herein, it is respectfully submitted that this Court should grant Plaintiffs' Petition for Certiorari, in furtherance of its supervisorial powers and in furtherance of the ends of justice; and in order to make a clear statement of the law and reaffirm the basic principles applicable to motions for summary judgment in the federal courts; and upon such grant, reverse and remand the case for trial on the merits.

FOOTNOTES

1. The complete caption of the case (therefore, the names of all the parties to the suit): MARK HEIMBACH, individually and as Acting President of CITIZENS COMMITTEE TO SAVE WATER STREET and LEON STOUT, ELAINE STOUT, LENORA SMITH, MARGARET MAHAR, and CAROLYN MORRIS, individually and as members of CITIZENS COMMITTEE TO SAVE WATER STREET, Plaintiffs,
2. against VILLAGE OF LYONS (WAYNE COUNTY, NEW YORK); RICHARD R. EVANGELIST, MARY C. BOYCE, PETER STIRPE and JOHN W. MC CRANELS, individually and as members of the Village Board of the defendant VILLAGE OF LYONS; JOHN DASHNEY, individually and as Mayor of the defendant VILLAGE OF LYONS; LOUIS A. SALERNO, individually and as Building Inspector of the defendant VILLAGE OF LYONS; JOHN LESE, individually and as Chief of Police of the defendant VILLAGE OF LYONS; JAMES J. FABINO, individually and as former Mayor of the Defendant VILLAGE OF LYONS; JOHN PERRY, individually and as JUSTICE COURT JUDGE of the defendant, VILLAGE OF LYONS; JOHN DASHNEY individually and as former police Commissioner of the defendant VILLAGE OF LYONS; RICHARD R. EVANGELIST, individually and as Police Commissioner of the defendant VILLAGE OF LYONS: and JOHN DOE, RICHARD DOE and JAMES DOE, being one or more police officers of the defendant VILLAGE OF LYONS whose real names are presently unknown (sic), Defendants.
3. Page One of the Verified Complaint reads as follows: "I. PRELIMINARY STATEMENT This is an action for injunctive and declaratory relief and damages pursuant to 42 USC 1983 and 1985. Plaintiffs assert that the defendants acted under color of law so to and have

effectively prevented them from exercising their rights of freedom of speech, right to petition the government for the redress of grievances and their right to peacefull (sic) assembly, all by the enforcement of certain alleged provisions of the Building Construction Code of the State (sic) of New York. The constitutionality of the statutes is not at issue and the plaintiffs contend that the statutes on (sic) underlying regulations on their face do not apply to plaintiffs and other persons having similar status" . . . II. JURISDICTION The jurisdiction of the court is asserted under the following provisions: 1) 28 USC 1331--federal questions where damages exceed \$10,000; 2) 28 USC 1343--power of court to entertain civil rights cases under 42 USC 1983 and 1985; 3) 28 USC 2283--power of court to grant injunction as part of relief under 42 USC 1983 and 1985; 4) 28 USC 2201 & 2203 and 42 USC 1983 & 1985--power of court to grant injunctions in civil rights cases; 5) 42 USC 1983 & 1985--power of court to hear civil rights cases for denial of rights under color of law and to grant injunctive, declaratory and monetary damage relief."

4. The text of the TRO signed by Judge Burke on October 21, 1977, is as follows: "Upon hearing HUGH S. SILBERSTEIN, ESQ., as attorney for the Plaintiffs, and ANTHONY J. VALLANI (sic), ESQ., as attorney for the defendants, and after due deliberation being had, it is ORDERED THAT THE DEFENDANTS, AND

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THEIR AGENTS, SERVANTS AND EMPLOYEES ARE TEMPORARILY RESTRAINED FROM DOING, COMMITTING, PERMITTING TO BE DONE OR INDUCING THE FOLLOWING ACTS: 1. Arresting the Plaintiffs, or any of them for being present at premises at 40 Water Sbreet (sic), Lyons, New York, for alleged violations of the New York SLate Buidling (sic) Construc-tion Code, or any related provisions of the Municipal Code of the Defendant, VIL-LAGE OF LYONS, or any other portion of the said Municipal Code; and 2. Issuing any warrant of arrest or other criminal or civil process or civil or criminal pro-ceeding which has the effect of bringing about or intended to have the effect of bringing about the conduct sought to be restrained, or which would abridge or threa-ten the First Amendment Rights of the plain-tiffs; and it is FURTHER ORDERED that pen-ding the hearing upon the application for a preliminary injunction or until further or-der of this Court, that the DEFENDANTS, AND THEIR AGENTS, SERVANTS AND EMPLOYEES ARE RE-STRAINED from the continuation of a certain criminal proceeding pending in the Village Court of the Village of Lyons entitled: "People of the STate (sic) of New York vs. Mark Heimbach" AND THAT THE SAID PROCEEDING IS STAYED IN ALL RESPECTS."

5. The District Court ruled, in pertinent part, by order of February 16, 1978, that "The Village of Lyons is not a person within the meaning of 42 U.S.C. 1983. The Village of Lyons and the individual defendants are im-mune from suit. Monroe vs. Pape, 365 U.S. 167; Moor vs. County of Alameda, 411 U.S. 693; City of Kenosha vs. Bruno, 412 U.S. 507. On due consideration it is hereby ORDERED that the complaint is dismissed on the merits as to all of the named defendants with costs."

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6. The CDGB grant referred to is that which resulted from a proposal submitted to HUD July 22, 1977, whose purpose was stated to be to restore buildings in the area; money allocated therein was used to pay for the "code enforcement program" which was to drive residents from the buildings, drive businesses from the Village, drive down property values and permit demolition after cheap acquisition of the buildings in the Historic District. The survey commissioned with HUD funds in furtherance of the program found the buildings to be fit for human habitation and easily salvageable; the only State judicial proceedings of record granted the remedy of extraordinary writ pursuant to C.P.L.R. Article 78 to an owner on the ground he was deprived procedural due process because the Village failed completely even to follow its own statutes or enact any procedures for hearing or review. In the Matter of the Application of ANTHONY CRISCI, etc. v. DASHNEY, et al., Supreme Court, Wayne County, Index 15574/78.

7. Defendants did not make an attempt to show that the increased enforcement of alleged building code violations was visited upon any portion of the Village outside the Historic District, and did not controvert Plaintiffs' submissions with any facts showing the area was not predominantly Black and Hispanic, that it was not the largest such area in the Village, and they agreed that no viable relocation plan existed for the several hundred families threatened with eviction. The Defendants did not controvert the allegation that one owner was forcibly removed by police at the behest of the building inspector, with no opportunity to be heard whatsoever.

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8. The Defendants' affidavits did not controvert that Plaintiffs were engaged in daily informational picketing; that their goal was to gain redress and to seek recourse for local residents against the code enforcement that was threatening them with loss of their homes, businesses and investments; nor did they deny that the continuation of these tactics posed a distinct threat to support for the program by others in this Village of 4200, as well as the prospects for continued federal funding for the Village.
9. A Board meeting was held on or about September 19, 1977. The Mayor resigned on September 20, 1977. Mr. Heimbach was arrested on September 21, 1977. This sequence of events presents circumstantial support for a connection between and among them of a causal nature. Defendants do not deny the sequence, simply the inference that because of the exercise of First Amendment rights by CCSWS, and an impending confrontation the Mayor resigned, and Mr. Heimbach was arrested. It is also not controverted that thereafter the Village officials named as Defendants attempted to keep Plaintiffs off the premises, and threatened to rearrest Mr. Heimbach and arrest others when they later entered, once again with the consent of the landlord; nor did they deny that they thereafter refused to permit CCSWS members the rights granted to other Villagers in relation to petitioning the Village Board because CCSWS planned to, and later did seek recourse in the federal courts -- in fact they admitted this.
10. The injunction was granted on or about October 21, 1977 and extended until the suit was dismissed the following February. In their paper Defendants acknowledged they did not continue proceedings in relation to the premises at 40 Water Street at any time up to the second order of dismissal on the ground of Judge Burke's grant of injunctive relief, and the Second Circuit's affirmance of the same.
11. The Court of Appeals expressly affirmed the District Court's grant of injunctive relief in its decision, in which it reversed the grant of De

fendants' motion to dismiss, reported at 597 F. 2d 344 (2d Cir, 1979). The opinion is reproduced in full at A-1 to A-7.

12. The District Court's opinion granting summary judgment in favor of Defendants is reproduced in full at A-8 to A-39.
13. The Court of Appeals decision is reproduced in full at A-40-43. This decision was rendered informally. Neither the District Court decision nor the decision of the Court of Appeals has yet been reported.
14. Defendants herein did not even set forth good faith as an affirmative defense in their answer.
15. In Younger, an action challenging the constitutionality of California's Criminal Syndicalism Act, a three-Judge District Court held the Act impermissibly vague and overbroad and unconstitutional on its face and issued an injunction; Defendant District Attorney appealed. The Supreme Court, Mr. Justice Black writing for the majority, held that even if the Act under which one of the Plaintiffs was being prosecuted was unconstitutional, that Plaintiff was not entitled to equitable relief in federal court against prosecution in the state court, where the injury he faced was solely incidental to every criminal proceeding brought lawfully and in good faith.
16. The power of the federal court to issue an injunction in actions brought pursuant to 42 U.S.C. Sec. 1983 is a recognized exception to the provisions of 28 U.S.C. Sec. 2283. See Mitchum v. Foster, supra, which was a complaint for injunctive and declaratory relief wherein Plaintiff alleged that action of state judicial and law enforcement officials in closing down his bookstore as a public nuisance was depriving him of rights protected by the First and Fourteenth Amendments. A single federal District Judge issued temporary restraining orders, and a three-

Judge District Court was thereafter convened. After a hearing, the latter Court, 315 F. Supp. 1387, dissolved the temporary restraining orders and refused to enjoin state court proceedings on the ground that it had no power to do so under the anti-injunction statute, and Plaintiff brought a direct appeal to this Court. Mr. Justice Stewart held that the provision of the Civil Rights Act authorizing a suit in equity to redress deprivation under color of law of any rights, privileges or immunities secured by the Constitution is within the "expressly authorized" exception of the federal anti-injunction statute prohibiting the federal courts from enjoining state court proceedings except as expressly authorized by Act of Congress.

17. Plaintiffs sought preliminary injunctive relief against continued prosecution of criminal proceedings against them in state court. The complaint alleged that the proceedings had been brought in retaliation for, and to deter Plaintiffs from, exercise of their First Amendment rights to bring a civil suit. The United States District Court for the Northern District of Georgia, Moye, Jr., J., held that the Young doctrine precluded the enjoinder of a state criminal prosecution brought in bad faith unless there was shown a threat of repeated or multiple prosecutions. Plaintiff appealed. The Court of Appeals for the Fifth Circuit, Brown, C.J., held that a state prosecution undertaken in retaliation for or to deter exercise of constitutionally protected rights may be enjoined regardless of whether the criminal defendant is threatened with repeated or multiple prosecutions. The case was reversed and remanded for resolution of certain factual issues.

18. Plaintiff clearly made a showing of bad faith and harassment and illegal arrest that Defendants have yet to negate. See Younger v. Harris, supra; Wilson v. Thompson, supra; Mitchum v. Foster, supra; Perez v. Ledesma, supra; Pizzolato v. Perez, supra; Heimbach v. Lyons, supra; Part I, supra.

19. The warrant of arrest in this matter claimed action taken pursuant to the New York State Building Construction Law. See A-55. Said law contains no criminal provisions or penalties, its citations in relation to certificates of occupancy relate only to owners, Executive Law § 383(c); and state law provides that no more stringent legislation is permitted upon its enactment by a local municipality. Idelevitz v. Glen Cove, 230 N.Y.S. 2d 591 (Sup. Ct. 1962); Bon-Air Estates, Inc. v. Building Inspector of Ramapo, 31 A.D. 2d 502, 298 N.Y.S. 2d 763 (1969). See also, 1969 Ops St Compt File #129. Hence Mr. Heimbach was unquestionably not acting in derogation of any statute or ordinance, as the Court of Appeals noted. The Village Justice Court has no jurisdiction to prosecute anyone for any alleged violation of the New York State Building Construction Code in a criminal proceeding. The Code, by its terms provides for no such sanction, nor does the Penal Law nor the Criminal Procedure Law.

20. The Court below admitted it did not understand Plaintiffs' complaint, and in effect granted Defendants' earlier motion to dismiss under another title, while erroneously placing the burden of persuasion upon Plaintiffs.

21. The District Court made much of the absence of an affidavit from landlords Pikoff and Spencer. Rule 56 does not require Plaintiff to depose his own witnesses. And where, as here, Mr. Spencer and Mr. Pikoff are fearful of repercussions from their involvement the likelihood of Plaintiffs' obtaining an affidavit from them for use in opposing a motion for summary judgment was nil. That is not a reason to grant summary judgment in favor of Defendants; their failure to produce such an affidavit might have been reason to deny their motion, see Adickes v. Kress, supra.
22. The Circuit Courts agree with this fundamental proposition. See, e.g., Kim v. Coppan State College, 662 F. 2d 1055 (4th Cir. 1981); Alvey v. United Air Lines, 494 F. 2d 1031 (D.C. Cir. 1974); Ramirez v. National Distillers and Chem Corp., 586 F. 2d 1315 (9th Cir. 1978); Dreher v. Sielaff, 636 F. 2d 1141 (7th Cir. 1980); Bolack v. Underwood, 340 F. 2d 816 (10th Cir. 1965). It has been held that summary judgment can only be granted where Plaintiff cannot prevail as a matter of law. Experimental Engineering Corp. v. United Technologies Corp., 614 F. 2d 1244 (9th Cir. 1980). The Second Circuit already decided this issue in Plaintiffs' favor in 1979.

APPENDIX

EDITOR'S NOTE

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 610—August Term, 1978.

(Submitted January 19, 1979 Decided April 26, 1979.)

Docket No. 78-7467

MARK HEIMBACH, individually and as Acting President of
CITIZENS COMMITTEE TO SAVE WATER STREET,

Plaintiff-Appellant,

—v.—

VILLAGE OF LYONS (WAYNE COUNTY, NEW YORK), *et al.*,

Defendants-Appellees.

Before:

WATERMAN, FEINBERG and VAN GRAAFEILAND,

Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York (Burke, J.) dismissing this suit for damages and declaratory and injunctive relief brought under 42 U.S.C. §§ 1983 and 1985.

Dismissal order affirmed as to the action for damages against the village justice; as to all other defendants-ap-

pellees, reversed and remanded for further proceedings below.

MARK HEIMBACH, Lyons, New York, *Appellant,*
pro se.

JOSEPH V. MCCARTHY, Brown, Maloney, Gallup,
Roach & Busteed, P.C., Buffalo, New
York, *for Defendants-Appellees.*

PER CURIAM:

The plaintiff-appellant, Mark Heimbach, individually and as Acting President of Citizens Committee to Save Water Street, appeals from a judgment of the United States District Court for the Western District of New York (Burke, J.) dismissing this suit brought under 42 U.S.C. §§ 1983 and 1985. The plaintiffs below are allegedly residents of the Village of Lyons and members of organizations called the "Eastern Farm Workers Association" (hereinafter "EFWA") and "Citizens Committee to Save Water Street" (hereinafter "CCSWS"). The defendants-appellees are the Village of Lyons, members of its present and past board of trustees, the village Justice of the Peace, the village Chief of Police, the village Building Inspector, and certain fictitious defendants. We affirm the dismissal order as to the action for damages against Justice John Perry; as to all other defendants-appellees, we reverse and remand for further proceedings below.

The complaint alleged that the defendants acted in concert under color of state law so as to prevent, and that they, through a series of harassments and illegal evictions and arrests, effectively did prevent, the plaintiffs from

exercising their first amendment rights to freedom of speech, to petition the government for the redress of grievances, and to peaceful assembly. More specifically, the plaintiffs alleged that efforts have been illegally made by the defendants to evict low-income people from their homes and buildings on Water Street in the Village of Lyons, so that the Lyons Village Government could redevelop the area for business and commercial interests. In furtherance of that goal, they alleged that the defendants harassed and illegally evicted the EFWA and CCSWS from premises on Water Street in the Village of Lyons. They alleged further that the defendants harassed and illegally arrested Mark Heimbach, the operations manager of the EFWA and the Acting President of the CCSWS, for a supposed misdemeanor pursuant to a section of the State Building Construction Code which has no provision for criminal penalties, and, in particular, has no penalties applicable to a tenant such as appellant Heimbach. The plaintiffs sought damages and declaratory and injunctive relief.

In dismissing the suit against the Village of Lyons, Judge Burke correctly relied upon the then binding precedents of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), and *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), and ruled that the "Village of Lyons is not a person within the meaning of 42 U.S.C. 1983." However, subsequent to the ruling of Judge Burke, the U. S. Supreme Court decision in *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018 (decided June 6, 1978), overturned those precedents and held that the legislative history of the Civil Rights Act makes it clear that a municipality is indeed a "person" under § 1983. As the appellant alleges actions implementing an official policy of

harassment and encroachment upon first amendment rights, he states a claim for damages and injunctive relief against the village. *Monell, supra*, 98 S.Ct. at 2036. *Cf. Turpin v. Mailet*, 579 F.2d 152, 164 (2d Cir. 1978), *vacated and remanded in light of Monell sub nom. West Haven v. Turpin*, 47 U.S.L.W. 3368 (U.S. Nov. 27, 1978) (damage action maintainable where actions "authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level.")

Judge Burke further ruled that the individual defendants are immune from suit. In so ruling, the district court judge was correct as to the suit for damages against the Village Justice Court Judge, John Perry, inasmuch as Justice Perry, by signing a criminal arrest warrant against appellant Heimbach, was not acting "in the 'clear absence of all jurisdiction.' [*Bradley v. Fisher*,] 13 Wall. [80 U.S. 335, 20 L.Ed. 646 (1872)], at 351." *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105 (1978). Justice Perry does have jurisdiction over criminal matters under New York State law, C.P.L. § 100.55, and has the power to issue criminal warrants. C.P.L. § 120.20(1). As the Court stated in *Bradley v. Fisher, supra*, 80 U.S. (13 Wall.) at 352:

[I]f . . . a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for this judicial con-

sideration, whenever his general jurisdiction over the subject-matter is invoked.

Thus, while Justice Perry may have acted maliciously in signing a criminal arrest warrant against appellant Heimbach, as appellant maintains, the justice is nonetheless immune from suit for damages for his actions. The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action. See *Allee v. Medrano*, 416 U.S. 802, 819-20, 94 S.Ct. 2191, 2202, 40 L.Ed.2d 566 (1974); *Person v. Association of Bar of City of New York*, 554 F.2d 534, 537 (2d Cir.), cert. denied, 434 U.S. 924 (1977); *Littleton v. Berbling*, 468 F.2d 389, 395-414 (7th Cir. 1972), rev'd on other grounds sub nom. *O'Shea v. Littleton*, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir.), cert. denied, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972); *Boddie v. State of Connecticut*, 286 F.Supp. 968, 971 (D. Conn. 1968), rev'd on other grounds but aff'd sub silentio on limitation on judicial immunity, 401 U.S. 371, 91 S.Ct. 780 (1971). Moreover, inasmuch as appellant Heimbach alleged a pattern of harassment and alleged that a criminal prosecution was initiated against him in bad faith without hope of conviction and which resulted in a chill upon the exercise of his first amendment rights, his allegations are sufficient to remove any bar to injunctive interference with state court criminal prosecutions. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971); *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

The other village officials do not share Justice Perry's absolute immunity from suit for damages; rather, they are entitled merely to a qualified good faith immunity. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43

L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967).

Plaintiffs here have alleged bad faith and improper and discriminatory motives on the part of the police officers who served a facially invalid warrant upon appellant Heimbach. Hence, those cases relied upon by the appellees dealing with "the defenses of good faith purpose and reasonable grounds," *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975), are inapposite and do not warrant the dismissal of this action against the officers. See *Pierson v. Ray*, *supra*; *Tucker v. Maher*, 497 F.2d 1309, 1313 (2d Cir. 1974); *Ellenburg v. Shepherd*, 304 F.Supp. 1059, 1061-62 (E.D. Tenn. 1966), *aff'd*, 406 F.2d 1331 (6th Cir. 1968), *cert. denied*, 393 U.S. 1087, 89 S.Ct. 878 (1969). See also *Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 616 (1871); *Guzman v. Western State Bank of Devils Lake*, 540 F.2d 948, 951-52 (8th Cir. 1976).

Similarly, plaintiffs' allegations of bad faith in the administration of the State Building Construction Code and the zoning ordinances preclude dismissal of the action against the other village officials on the grounds of a qualified immunity. Accepting the allegations in the complaint as true, as we must in our review of the district court's dismissal, the village officials acted neither with a good faith belief in the lawfulness of the actions taken nor with reasonable grounds so to believe. Thus, dismissal of the suit against the village officials below was erroneous. *Scheuer v. Rhodes*, *supra*, 416 U.S. at 247-48, 94 S.Ct. at 1692; *Wood v. Strickland*, *supra*, 420 U.S. at 322, 95 S.Ct. at 1001; *Laverne v. Corning*, 522 F.2d 1144, 1150 (2d Cir. 1975).

Accordingly, we affirm the dismissal of the damage claims against Village Justice Perry but reverse the remainder of the judgment of the district court and remand for further proceedings so that plaintiffs below may be given an opportunity to prove their allegations.

Decision and Order of the United
States District Court for the Western
District of New York

No. CIV-77-562T

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Present: Honorable Michael A. Telesca
District Judge

MARK HEIMBACH, et al.,

v.

VILLAGE OF LYONS, et al.

This action, one of the oldest on the Court's docket, was brought in 1977 under 42 U.S.C. Sections 1983 and 1985 seeking redress of alleged constitutional violations committed by defendants in their efforts to upgrade a section of the Village of Lyons known as the Water Street area. Pending before me is defendants' motion for summary judgment and for attorneys fees. Also pending

is plaintiffs' cross-motion for summary judgment and attorneys fees, which, as will be set forth fully below, was not timely filed. For the reasons set forth below, defendants' motion for summary judgment is granted in all respects but one, and their motion for attorneys fees is denied. Plaintiffs' cross-motion for summary judgment and attorneys fees is denied.

FACTS

In 1976 and 1977 defendant Village of Lyons submitted applications through the Wayne Planning Board for federal assistance under the Community Development Block Grant (CDBG) program. In conjunction with these applications, the Village Board of Trustees hired the architectural firm of Sherman and Sherman from Newark, New York to study and evaluate the historic buildings located in the Water and Broad Street area in the Village. The Sherman and Sherman architect

who inspected the buildings was accompanied by the Village Building Inspector, defendant Louis A. Salerno, who took notes on apparent violations of State and local building codes. Sherman and Sherman presented its report to the Village Board of Trustees and to landlords from the Water and Broad Street area, at a public meeting on May 24, 1977.

In approximately July of 1977, defendant Salerno issued notices to remedy violations to various landlords of buildings which were out of compliance. One of the landlords served with a notice was a Travis Spencer, owner of a storefront later rented by plaintiff Citizens Committee to Save Water Street. On August 16, 1977, plaintiff Mark Heimbach and a group with which he was affiliated, the Eastern Farm Workers Association, began picketing outside the Village Board meetings to protest the building code enforcement program, which they felt was directed at removing poor and minority persons from the Broad and Water

Street areas. The next day defendant Salerno inspected the premises they were then renting at 18 Geneva Street and the group's then-landlord (Mr. Valcho "Vic" Pikoff) notified them that they would have to vacate. Mr. Salerno states that his inspection was done at the landlord's request (because the landlord had recently completed some repairs and wanted to see if they met code standards), and that he (Mr. Salerno) did not know that Eastern Farm Workers (or anyone else) was renting the building at that time.

During that summer, plaintiff Heimbach and others formed the Citizens Committee to Save Water Street to "expose [the] defrauding of our people" by the Village in its alleged misuse of federal and State redevelopment funds to destroy the economic viability and vitality of the community. After hearing the group's concerns at public Board meetings and at least two private informal meetings, Mayor Fabino notified the Department of Housing

and Urban Development (HUD) on September 2, 1977 that the Village was concerned about the relocation of any residents in the affected area. On September 12, 1977 Village Attorney Anthony J. Villani wrote to the Board of Trustees that the Board was "free to utilize the [C]itizens [C]ommittee as an advisory group," but that the Citizens Committee could not have any actual decision-making power for the Village.

On September 10, 1977 the Eastern Farm Workers Association entered into a lease with Travis Spencer for the premises at 40 Water Street, Lyons, New York. The lease term was to begin October 1, 1977. Apparently, as of September 10, the defects noted in Mr. Spencer's July 6, 1977 Notice to Remedy Violation (inadequate fire separations, egress, light, and ventilation, and loose bricks) had not been entirely corrected. It appears that Mr. Spencer intended to correct these deficiencies

before October 1; nevertheless, on or about September 12, the Eastern Farm Workers Association occupied the premises. Plaintiff Heimbach contends that the Eastern Farm Workers Association moved in with Mr. Spencer's permission, and that Mr. Spencer had given them a key. Mr. Spencer, however, subsequently provided Building Inspector Salerno with a written statement which makes it appear that he first learned about the premises being occupied from defendant Salerno.

On September 17, 1977, defendant Salerno served a Notice to Remedy Violation on the Eastern Farm Workers Association as tenant of 40 Water Street. The Notice states that the Farm Workers Association was in violation of the State Building Construction Code and local zoning ordinances because it was occupying the premises without a Certificate of Occupancy, and ordered the Farm Workers Association to remedy the conditions at once.

By all accounts, plaintiff Heimbach refused to vacate the premises. After waiting several days to see whether the premises would be vacated, Building Inspector Salerno swore out an Information before Justice Court Judge John Perry (a defendant in this action), alleging that plaintiff Heimbach had violated the State Building Construction Code on September 21, 1977 by occupying the premises at 40 Water Street with fire separations or a Certificate of Occupancy. Attached to his Information was the statement from Travis Spencer which made it appear that Mr. Heimbach did not have his permission to move in, and that he (Mr. Spencer) had not had an opportunity to install the fire separations and obtain a Certificate of Occupancy. Justice Perry issued an arrest warrant for plaintiff Heimbach on September 21, and on September 22, plaintiff Heimbach was arrested and arraigned before Justice Perry. A few hours later, bail was raised and plaintiff Heimbach was released. The case has never been prosecuted further;

because he was a defendant in this case, Justice Perry transferred the case to Wayne County Court, where it remains to this day.

Through leaflets handed out by the Citizens Committee, the Village Board then became aware that plaintiffs were threatening litigation. On October 7, 1977, Village Attorney Villani advised the Village that further discussions between it and plaintiff Heimbach or the Eastern Farm Workers Association should take place between their respective counsel. Defendant Fabino resigned from the office of Mayor for personal reasons on September 21, 1977, and was succeeded by the late John C. Dashney, also a defendant in this action.

On October 19, 1977, the complaint in this action was filed, along with a request for a temporary restraining order. On October 21, 1977, my predecessor Judge Harold P. Burke issued an order temporarily restraining defendants from: arresting any plaintiffs for being present at 40 Water

Street, or for alleged violations of the New York State Building Construction Code or any related provisions of the Village Municipal Code; issuing any arrest warrant or other civil or criminal process which would have the same effect, or which would abridge or threaten the First Amendment rights of plaintiffs; or continuing with the criminal proceeding against Mark Heimbach.

Later, in response to a motion by defendants, Judge Burke on February 17, 1978 dismissed the action against all defendants on the basis of the Supreme Court's holding in Monroe v. Pape, 365 U.S. 167 (1961). Subsequent to Judge Burke's decision, the Supreme Court reversed Monroe v. Pape, in Monell v. Department of Social Services, 436 U.S. 658 (1978). On the basis of Monell, the Second Circuit reversed Judge Burke, in a decision reported at 597 F. 2d 344 (1979). The Second Circuit dismissed the claim for damages against Justice Perry, on the ground of judicial immunity. The case now comes before me, after three changes of attorneys

by plaintiffs and seven more years of discovery, on the motion by the remaining defendants for summary judgment, and on plaintiffs' late-filed cross-motion for summary judgment.

DISCUSSION

I.

Defendants' motion for summary judgment was filed on December 19, 1985, and was originally returnable December 31, 1985. Because that date was not a motion day for the Court, the return date was adjourned, and because plaintiffs requested additional time to submit their answering papers, the adjourned date was set as January 22, 1986. Under the Local Rules of Practice of the United States District Court for the Western District of New York, plaintiffs' papers should have been served and filed three days prior to the return date. Local Rule 14(C). Under Fed. R. Civ. P. 6(a), in computing any period of time prescribed or allowed by the local rules of any district court, when the

period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. Under these Rules, plaintiffs' answering papers and memoranda should have been served and filed by January 16, 1986. In addition, the Guidelines for Practice and Procedure before this Court, Section V(C), require that opposing papers for a motion be filed and served three business days prior to the return date of the motion, which would likewise have been January 16, 1986.

Plaintiffs' answering papers were filed with the Court five days late, on January 21, 1986, the day before the return date. Accordingly, this Court is justified in declining to consider the opposition papers on the ground that they were untimely filed, and in treating defendants' summary judgment motion as unopposed. Davidson v. Keenan, 740 F. 2d 129, 132, (2d Cir. 1984). Plaintiffs made no

attempt to communicate to this Court that the papers would be untimely filed, nor did they seek an extension of time to file their papers. The only excuse offered by plaintiffs' counsel at oral argument was that January 20th was a Federal holiday; in light of Fed. R. Civ. P. 6(a)'s specific exclusion of Martin Luther King Jr.'s birthday from the computation of time, that is no excuse at all.

II.

Even if plaintiffs' papers had been timely submitted, they would have been defective for another procedural reason. Fed. R. Civ. P. 56(e) requires that supporting and opposing affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Time and time again, the Second Circuit has held that an attorney's affidavit which is not based on first-hand knowledge is not entitled to any weight, and is

insufficient to oppose a summary judgment motion. Chandler v. Coughlin, 736 F. 2d 110, 113-14 (2nd Cir., 1985); Wyler v. United States, 725 F.2d 156, 160 (2nd Cir., 1983); United States v. Bosugi, 530 F. 2d 1105, 1111, (2nd Cir., 1976). Nor is an attorney's statement of disputed facts a substitute for and affidavit based on personal knowledge. Zanghi v. Incorporated Village of Old Brookville, 725 F. 2d 42 (2nd Cir., 1985); L & L Started Pullets, Inc., v. Gourdine, 762 F. 2d 1, 3-4 (2nd Cir., 1985). Even in cases involving alleged discriminatory intent, in which summary judgment is generally not appropriate, a plaintiff must still come forward with evidence meeting the requirements of Rule 56(e), to withstand a summary judgment motion by defendants. Adickes v. S.H. Kress & Co., 398 U.S. 144, 160-61 (1970); Gatling v. Atlantic Richfield Co., 577 F. 2d 185, 188 (2nd Cir., 1978), cert. denied, 439 U.S. 861 (1978); see also, Markowitz v.

Republic National Bank of New York, 651
F. 2d 825, 828 (2nd Cir., 1981).

Plaintiffs in this case submitted only a three page attorney's affirmation in response to the motion. Along with the affirmation, a memorandum of law was submitted containing a long list of allegedly uncontroverted facts in support of plaintiffs' cross-motion for summary judgment, and also containing voluminous exhibits. Similar submissions have been held to be insufficient to support the granting of summary judgment, and to be of "no more use" in opposing a grant of summary judgment. Schiess-Froriep Corp. v. S.S. Finnsailor, 574 F. 2d 123, 126-27 (2nd Cir. 1978).

Accordingly, even if plaintiffs' paper had been timely submitted, they would be insufficient to oppose an award of summary judgment to defendants.

III.

Nevertheless, even though plaintiffs have not submitted evidentiary matter to establish that there is indeed a genuine issue for trial, defendants must still establish the absence of a genuine issue concerning any material fact, if they are to prevail on their summary judgment motion. Zanghi v. Incorporated Village of Old Brookville, supra, 752 F 2d at 47; 6 J. Moore, Moore's Federal Practice, Paragraph 56.22 (2), p. 56-1344 and Paragraph 56-1389-1390 (2nd Ed. 1985). Defendants have done so in this case.

It is difficult to decipher exactly what plaintiffs in this case have alleged. They have presented the Court with an undifferentiated collection of facts, and ask the Court to find that these facts establish a conspiracy by defendants to violate

Constitutional rights of plaintiffs, specifically First Amendment, Due Process, and Equal Protection rights. This Court should not have to sift through the entire record to discern possible causes of action for plaintiffs who are represented by counsel. Nevertheless, the Court must do so when faced with defendants' summary judgment motion.

A.

The plaintiffs attempt to tie their various constitutional claims together under the umbrella of an alleged conspiracy by defendants to violate these rights. According to plaintiffs, the Village was attempting to drive out poor and minority residents through its use of the CDBG money and strict code enforcement. Defendants have controverted this argument in affidavits supplied by defendants Fabino, Lese and Salerno that there was no conspiracy, and that they were acting in good faith to improve the Water Street area (without

necessarily driving out poor or minority residents) when they committed the act complained of.

Where a plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment. Something more than a fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact.

* * *

Courts must be particularly cautious to protect public officials from protracted litigation involving specious claims.

Contemporary Mission, Inc. v. U.S. Postal Service, 648 F. 2d 97, 107 (2nd Cir. 1981).
See also, Sommer v. Dixon, 709 F. 2d 173, 174-75 (2nd Cir. 1983), cert. denied, 464 U.S. 857 (1983); Batista v. Rodriguez, 702 F. 2d 393, 397 (2nd Cir., 1983); and Koch v. Yunich, 533 F. 2d 80, 85 (2nd Cir.,

1976) (in pleading alleging conspiracy, facts forming the basis for the conspiracy must be averred with particularity).

The record contains nothing more than plaintiff Heimbach's conclusions that defendants were conspiring to violate his civil rights. He states in his deposition that defendants were pressuring his landlords to evict him because of his organizations' political activities (Deposition Transcript pgs. 11-21, 61, 62-64, 73-77, 83-85, 88-89). Defendant Salerno refutes these allegations in his deposition and his affidavit submitted with defendants' summary judgment motion. He states that Heimbach's first landlord, Mr. Pikoff, approached him to do an inspection of the premises occupied by the Eastern Farm Workers Association, because he (Mr. Pikoff) had recently completed repairs and wanted to ensure that the building was now in compliance. Mr. Salerno

states further that the notice of violation served upon Heimbach's second landlord, Mr. Spencer, was served in July, well before Mr. Spencer even met plaintiff Heimbach, and that enforcement action was taken when plaintiff Heimbach occupied the premises because Mr. Spencer had previously agreed not to rent out the premises until the violations were corrected and a certificate of occupancy was obtained.

As set forth above, plaintiffs have failed to submit timely or sufficient opposing papers to the motion. In addition, despite seven years opportunity for discovery, the record contains nothing (such as an affidavit or deposition transcript from Mr. Pikoff or Mr. Spencer) which would support plaintiff Heimbach's conclusions that they were being pressured because his organizations were their tenants.

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Similarly, plaintiff Heimbach in his deposition refers to eviction of a Mr. Rodriguez (Transcript at 47), and an elderly amputee (Transcript at 72-73). Yet these evictions were not carried out by the Village, but by particular landlords who chose not to bring their buildings up to code standards. No affidavits from the landlords, the tenants, or any other individuals are submitted to support plaintiff Heimbach's conclusion that these or any other evictions were illegal, or were somehow part of a conspiracy directed against the Citizens Committee. Likewise, plaintiff Heimbach relates conversations he had with defendant Peter Stirpe, a Village Board member who allegedly told plaintiff Heimbach that the Village Board, defendant Salerno, and the Village Attorney were pushing the evictions (Transcript at 54-55). Evidently, no attempt was made to depose Mr. Stirpe, and defendants Salerno and Fabino have denied

the allegation.

Other than plaintiff Heimbach's conclusions during his deposition, there are simply no facts in the record to support plaintiffs' allegations that defendants conspired to violate their civil rights. His unsupported conjectures are not enough to withstand a summary judgment motion. See Quarles v. General Motors Corp. 758 F. 2d 839, 840 (2nd Cir., 1985); Gatling v. Atlantic Richfield Co., 577 F. 2d 185, 188 (2nd Cir., 1978); cert. denied, 439 U.S. 861 (1978). Defendants have met their burden of showing that no material issue of fact remains as to this question.

B.

According to plaintiffs' Memorandum of Points and Authorities, the gravamen of plaintiffs' complaint is that defendants attempted to and did infringe plaintiffs'

First Amendment rights to freedom of speech, petition, and peaceful assembly. Defendants code enforcement program and arrest of Mark Heimbach, it is alleged, were in retaliation for plaintiffs' picketing and advocating the rights of minorities and poor people. Defendant Salerno's affidavit, and the affidavits and deposition transcripts of the other defendants, vigorously controvert this assertion, and point out that at no time did any defendant interfere with the picketing of the Village Board meetings.

On their face, the code enforcement program and the arrest of plaintiff Heimbach for a code-related misdemeanor are not directed at speech. Thus, these actions do not violate the First Amendment if they further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction

on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. United States v. Albertini, 105 S. Ct. 2897, 2906 (1985), quoting United States v. O'Brien, 391 U.S. 367, 377 (1968). It is beyond question that the building code enforcement program furthers an important or substantial governmental interest of protecting the public from unsafe buildings. Burtnieks v. City of New York, 716 F. 2d 982, 987 (2nd Cir., 1983); see also, English v. Town of Huntington, 448 F. 2d 319, 323 (2nd Cir., 1971).

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed making (sic) living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Berman v. Parker, 348 U.S. 26, 32-33 (1954).

Secondly, the plaintiffs do not attempt to argue that this governmental interest itself is somehow related to the suppression of free expression. Finally, plaintiffs do not argue that the enforcement of building codes intrinsically results in an incidental restriction on alleged First Amendment freedoms that is somehow greater than is essential to the furtherance of an interest. (Plaintiffs' argument that the building codes were being selectively applied to them because of their expression of their political views will be addressed below.)

Accordingly, defendants have met their burden of demonstrating that no material issue of fact exists, and that they are entitled to summary judgment as to plaintiffs' claim that defendants violated their First Amendment rights.

C.

Plaintiffs in their complaint also allege that the building codes have been selectively enforced against them and their landlords, not only because they represent the interests of minorities and poor persons, but also because of their picketing and other activities protected by the First Amendment. Presumably this argument is premised on the rationale underlying Yick Wo v. Hopkins, 118 U.S. 356 (1886), and subsequent cases, that a law which on its face is constitutional can become unconstitutional under the Equal Protection Clause of the Fourteenth Amendment if those in charge of administering it enforce it selectively. See English v. Town of Huntington, 448 F. 2d 319, (2nd Cir., 1971).

To qualify for "strict scrutiny" under the Equal Protection Clause, plaintiffs must

show both proof that a racially discriminatory purpose has been a motivating factor in official action, and proof that the official action results in a racially disproportionate impact. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 264-266 (1977). Beyond their conclusory allegations, plaintiffs have introduced absolutely no proof of either. They have introduced no clear pattern, unexplainable on grounds other than race, as in the Yick Wo case. They have introduced no statistical evidence of the type introduced in Washington v. Davis, 426 U.S. 229 (1976), that the burden of the code enforcement program fell disproportionately upon minorities. See also Jefferson v. Hackney, 406 U.S. 535 (1972). They have introduced no proof of a racially discriminatory motive, and there are simply no facts from which a court can infer a prejudiced motive, on the part of defendants.

Accordingly, plaintiffs are not entitled to strict scrutiny under the Equal Protection Clause because they represent minority interests.

Nor are plaintiffs entitled to strict scrutiny because they represent the interests of poor persons. Discrimination on the basis of wealth has never by itself provided an adequate basis for invoking strict scrutiny under the Equal Protection Clause. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 28-29 (1973).

Because no suspect class has been implicated, plaintiffs' claim of selective enforcement, even though it is arguably based on the exercise of plaintiffs' First Amendment rights, must be judged under ordinary equal protection standards. Wayte v. United States, 105 S. Ct. 1524, 1531 (1985). These standards require plaintiffs to show both

that the enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. *Id.* Very simply, throughout the record, plaintiffs have shown neither, whether based on race (as set forth above), poverty, First Amendment expression or any other classification. There is no indication that the code enforcement program was directed at anything other than improving the conditions of the buildings in the Water and Broad Street area, and was applied without regard to race, income, or political views.

Accordingly, there being no issue of material fact, defendants have met their burden on this issue under Rule 56.

D.

Plaintiffs also allege in their complaint that defendants' actions denied them due process. The Court will treat separately

plaintiffs' allegations concerning code enforcement generally, and plaintiffs' allegations concerning defendants' actions against Mark Heimbach in particular.

With respect to the code enforcement in general, plaintiffs point to a decision by the late New York State Supreme Court Justice Robert P. Kennedy in Matter of Crisci v. Dashney, Index No. 15574, (S. Ct. Wayne County, June 1, 1978), in which Justice Kennedy set aside a code enforcement proceeding against Mr. Crisci, a landlord, on the ground that the Village had not complied with the procedures set forth in its own code. Mr. Crisci is not a party to this action, however, nor have plaintiffs bothered to allege whether or not they (or any of their members) are property owners who have been served with a notice to remedy and then denied due process by the defendants (other than plaintiff Heimbach's interest as

New York Multiple Residence Law Section 306, which requires both a hearing' and notice of right to a hearing for one charged with building code violations.

Defendants counter that plaintiff Heimbach had no right to a hearing because he was arrested for failing to vacate a building for which no certificate of occupancy had been issued. This, defendants argue, constitutes a violation of the New York State Building Construction Code Section 385, and thus a "disorderly conduct" violation of Village of Lyons Municipal Code Section 17.100 and Section 20.2006, subd. 3 of the N.Y. Village Law, not just a building code violation.

At this point, I can see no Constitutional violation in plaintiff Heimbach's arrest. On its face the warrant appears to have been properly issued by Justice Perry (who, as the Second Circuit noted, is entitled to

, immunity from plaintiffs' damage claim).

It no longer appears, as alleged in the complaint, that the prosecution was initiated in bad faith, without hope of conviction, to chill the exercise of Mr. Heimbach's First Amendment rights.

Heimbach v. Village of Lyons, 597 F. 2d 344, 347 (2nd Cir. 1979).¹ Should the State Court determination of pertinent state law present the federal Constitutional issue in a different posture, plaintiff Heimbach is free to commence a separate action alleging a Constitutional violation.

IV.

Along with their motion for summary judgment, defendants have argued that they are entitled to an award of attorneys fees under 24 U.S.C. Section 1988, as the prevailing party in this action. Defendants are entitled to attorneys fees only if

plaintiffs' action was frivolous, unreasonable, or without foundation, or if plaintiffs continue to litigate after it clearly became so. Bonar v. Ambach, 771 F. 2d 14, 20 (2nd Cir., 1985). Although plaintiffs were unable to prove the conspiracy they alleged, I cannot say that their action was frivolous, unreasonable or without foundation so as to justify the imposition of attorneys fees. Obviously the allegations were at least serious enough to warrant the Second Circuit's 1979 reversal of Judge Burke's dismissal of the case.

Plaintiffs' request for attorneys fees contained in their cross-motion is denied, as plaintiffs were not the prevailing party in this action.

CONCLUSION

Accordingly, for the reasons set forth above, summary judgment is granted to

defendants as to all of the claims for relief set forth in plaintiffs' complaint, except for plaintiff Mark Heimbach's claim that his due process rights were violated when he was arrested on September 22, 1977. That claim is dismissed without prejudice.

Plaintiffs' cross-motion for summary judgment is denied, along with their request for attorneys fees.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESKA
United States District
Judge

DATED: Rochester, New York
February 1, 1986

1. I note that neither party has argued since the Second Circuit's 1979 decision that I should abstain from making a determination on the constitutional claim under Younger v. Harris, 401 U.S. 37 (1971), or Samuels v. Mackell, 401 U.S. 66 (1971).

A-41

Circuit Judges.

))))))))))

1.

This is an appeal from a judgment of
the United States District Court for the

Western District of New York, Telesca, J., granting summary judgment against all plaintiffs with respect to their allegation of concerted action to deprive them of civil rights in violation of 42 U.S.C. § 1983 (1982), their First Amendment claims and their selective prosecution in violation of the equal protection claims. Judge Telesca also granted summary judgment against all plaintiffs except plaintiff Heimbach with respect to their due process claims and dismissed Heimbach's due process claim without prejudice.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED substantially for the reasons spelled out in Judge Telesca's opinion below dated February 10, 1986.

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

THOMAS J. MESKILL, U.S.C.J.

JON O. NEWMAN, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other courts.

UNITED STATES CONSTITUTIONAL AMENDMENTS

U.S. Const. Amend. 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES STATUTES

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

1

UNITED STATES STATUTES

42 U.S.C. Section 1985

(1) Preventing officer from performing duty. If two or more persons in any State or Territory conspire to prevent, by force, intimidation, or threat, any person from accepting or holding any office, trust, or place of confidence under the United States, or from discharging any duties thereof; or to induce by like means any officer of the United States to leave any State, district or place, where his duties as an officer are required to be performed, or to injure him in his person or property on account of his lawful discharge of the duties of his office, or while engaged in the lawful discharge thereof, or to injure his property so as to molest, interrupt, hinder, or impede him in the discharge of his official

duties;

(2) Obstructing justice; intimidating party, witness, or juror. If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any

State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more

persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or depravation, against any one or more of the conspirators.

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FEDERAL RULES OF CIVIL PROCEDURE: (FRCP)

Rule 56: SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for

a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon.

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule

judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further
Testimony; Defense Required. Supporting
and opposing affidavits shall be made on
personal knowledge, shall set forth such
facts as would be admissible in evidence,
and shall show affirmatively that the
affiant is competent to testify to the
matters stated therein. Sworn or certified
copies of all papers or parts thereof re-
ferred to in an affidavit shall be attached
thereto or served therewith. The court may
permit affidavits to be supplemented or
opposed by depositions, answers to interro-
gatories, or further affidavits. When a
motion for summary judgment is made and
supported as provided in this rule, an
adverse party may not rest upon the mere
allegations or denials of his pleading,
but his response, by affidavits or as other-
wise provided in this rule, must set forth

specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits are Unavailable.

Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith.

Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall

forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

A-55

NEW YORK STATE STATUTES

Executive Law Section 383.

... For and in aid of administration and enforcement of the state building construction code ... each municipality of the state, through or in conjunction with its local building department, is expressly authorized and empowered: ...

c. To order in writing, the remedying of any condition found to exist in, on, or about any building in violation of the state building construction code. Such orders may be served upon the owner or his authorized agent personally or by sending by registered mail a copy of such order to the owner or his authorized agent at the address set forth in the application for permission for the construction of such building. Any local building department may, by action of an authorized officer thereof, grant in writing such time as may be reasonably necessary for achieving compliance with such order.

d. To issue certificates of occupancy, permits, licenses and such other documents in connection with the construction of such buildings as may be required by building regulations or which council may deem necessary, desirable or proper.

A certificate of occupancy for a building constructed in accordance with the provisions of the state building construction code shall certify that such building conforms to the requirements of the building regulations applicable to it. The certificate shall be in such form as the council may perscribe.

Every such certificate of occupancy shall, unless and until set aside or vacated by the board of review or a court of competent jurisdiction, be and remain binding and conclusive upon all state and municipal agencies as to all matters therein set forth and no order, direction or requirement at variance therewith shall be made or issued by any other state or municipal agency.

Executive Law Section 385

1. Any person, having been served with an order pursuant to the provisions of paragraph c of section three hundred and eighty three, who shall fail to comply with such order within thirty days after such service or within the time fixed by the local building department for compliance, whichever is the greater, and any owner, builder, architect, tenant, contractor, sub-contractor, construction superintendent, or their agents, or any other person taking part or assisting in the construction or use of any building who shall knowingly violate any of the applicable provisions of the state building construction code or lawful order of a local building department made thereunder shall be punishable by a fine of not more than five hundred dollars or thirty days in jail, or both.

2. Except as provided otherwise by law, such a violation shall not be a crime and the penalty or punishment imposed therefor

shall not be deemed for any purpose a penal or criminal penalty or punishment, and shall not impose any disability upon or affect or impair the credibility as a witness, or otherwise of any person convicted thereof.

STATE OF NEW YORK : COUNTY OF Wayne
Justice COURT. Village of Lyons

Warrant of Arrest

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:

To any Police Officer of the

Lyons Police Department,
Lyons, N.Y.

An Accusatory Instrument having been this day laid before this court, that the offense of the State
Building Construction Code, as adopted Chapter 11
Village of Lyons Municipal Code of the Village
of Lyons

has been committed, and accusing Mark Kleinback, defendant

thereof.
YOU ARE, THEREFORE, COMMANDED forthwith to arrest the above named Mark Kleinback

and bring him before this court at 78 William Street

Lyons, N.Y.
in the Village of Lyons
County of Wayne, N.Y.

Issued this 21st day of September, 1927

[Signature]
Judge

May be executed in County of issuance or adjoining County. 120-70

STATE OF NEW YORK
VILLAGE COURT

COUNTY OF WAYNE
VILLAGE OF LYONS

PEOPLE OF THE STATE OF NEW YORK

against

Mark Heinback,

Defendant

INFORMATION

Louis A. Salerno, duly appointed and presently
serving Building Inspector, by this Information makes written
accusation as follows:

That defendant ~~17-111~~, on the 21st day of September
1977, at about 1:00 PM, in the Village of Lyons
County of Wayne, State of New York, did wilfully, wrongfully,
and unlawfully violate the provisions of Section B402-4 of the
State Building Construction Code, as adopted Chapter 37 Village
of Lyons, County of Wayne, State of New York, in that the said defendant did
the aforesaid time and place:

Occupied premises at 40 Water Street in the
Village of Lyons without fire separations or
Certificate of Occupancy.

The facts upon which this information is based are
follows:

My own inspection of the premises and conversations
with the defendant.

WHEREFORE, complainant prays that Mark Weinback
be dealt with pursuant to law.

Lucia A. DeLeon
Complainant

Sworn to before me this
21st day of September, 1977.

John C. Perry
JOHN C. PERRY
VILLAGE JUSTICE
LYONS, NEW YORK

86-1060

Supreme Court, U.S.

FILED

FEB 26 1987

No. 86-1060
JOSEPH E. SPANIOLO, JR.
CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1987

HEIMBACH, et al.,

Petitioners,

vs.

VILLAGE OF LYONS, et al.,

Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR WRIT OF
CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT**

MALONEY, GALLUP, ROACH,
BROWN & MCCARTHY, P.C.

Attorneys for Respondents

1620 Liberty Building

Buffalo, New York 14202

(716) 852-0400

Susan A. Eberle
Of Counsel

47 PM

QUESTIONS PRESENTED

- I. WOULD A REVIEW BY THIS COURT CONSTITUTE NOTHING MORE THAN A THIRD JUDICIAL EXAMINATION OF THE FACTS OF THIS CASE WHERE THE FINDINGS OF THE COURTS BELOW ARE FAIR AND SUPPORTED BY SUBSTANTIAL EVIDENCE?
- II. SHOULD THIS COURT DECLINE TO GRANT A PETITION IN WHICH NO FEDERAL QUESTION OF IMPORTANCE TO THE PUBLIC WAS RAISED BY PETITIONERS?
- III. DOES THE SECOND CIRCUIT COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S OPINION REPRESENT A CONFLICT OF AUTHORITY WITH OTHER COURTS OF APPEAL REQUIRING SETTLEMENT BY THIS COURT?

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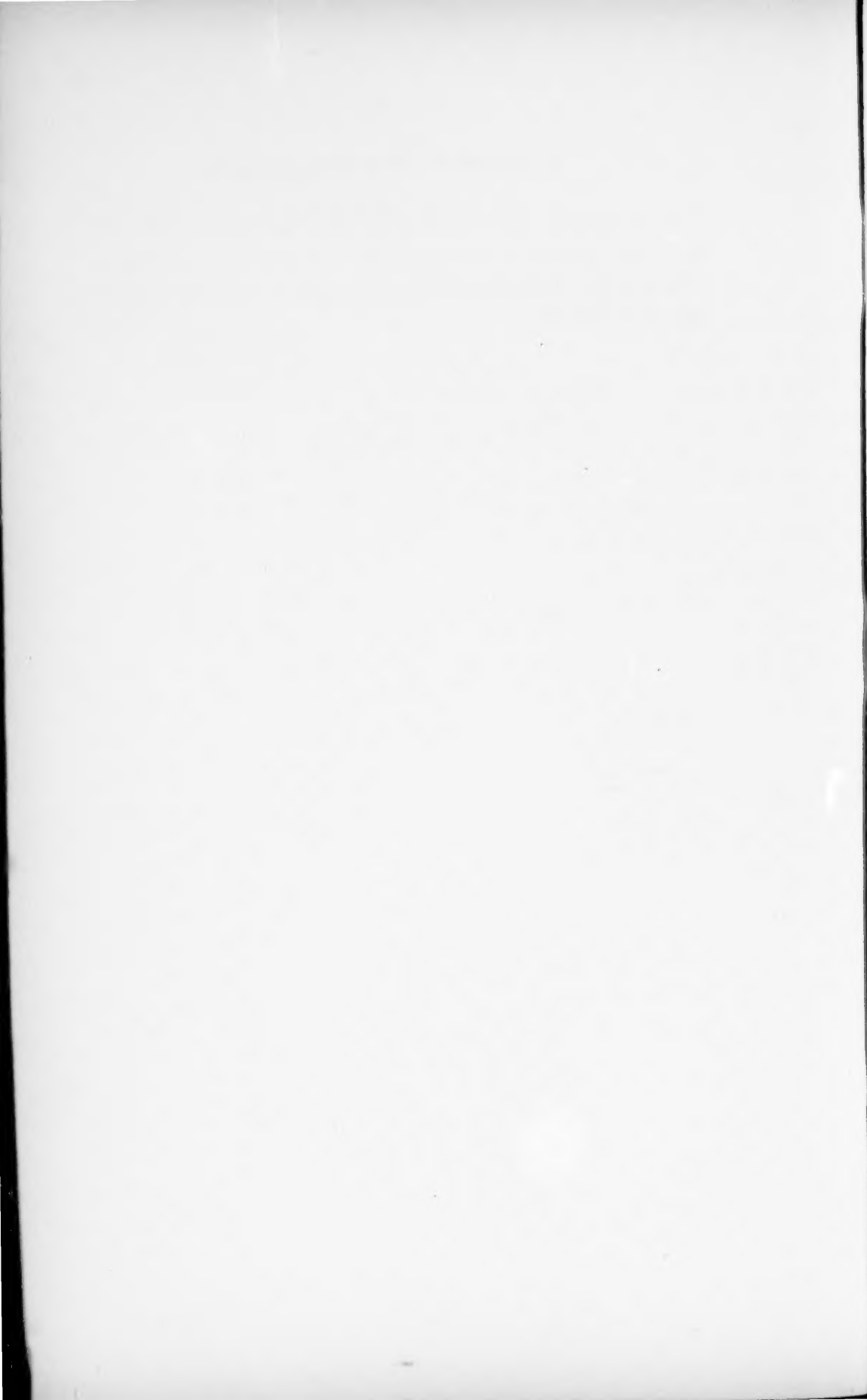
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STATEMENT OF JURISDICTION

Respondents concur with petitioners' Statement of Jurisdiction, but note that respondents were granted one extension of time in which to file their brief in opposition to the petition for a writ of certiorari.



STATEMENT OF THE CASE

The Village of Lyons, population 4,500, is located in mid-state New York and is of historical significance as one of the communities that developed when the old Erie Barge Canal was built. The respondents,¹ consisting of the Village of Lyons and various named officials of the Village, successfully sought to have some of the original buildings which were built next to the canal registered in the National Register of Historic Places. However, all of these buildings were in very poor condition and therefore respondents applied for federal assistance to upgrade these buildings, along with other sites in the Village. Respondents hired an architectural firm to perform an evaluation of the historic buildings, which disclosed numerous violations of State and local building codes. In an attempt to rectify this situation, respondents issued notices to remedy these violations to the owners of these buildings, many of whom chose to evict their tenants rather than bring

¹ Respondents consist of VILLAGE OF LYONS (WAYNE COUNTY, NEW YORK); RICHARD R. EVANGELIST, MARY C. BOYCE, PETER STIRPE and JOHN W. MC CRANELS, individually and as members of the Village Board of the defendant VILLAGE OF LYONS; JOHN DASHNEY, individually and as Mayor of the defendant VILLAGE OF LYONS; LOUIS A. SALERNO, individually and as Building Inspector of the defendant VILLAGE OF LYONS; JOHN LESE, individually and as Chief of Police of the defendant VILLAGE OF LYONS; JAMES J. FABINO, individually and as former Mayor of the defendant VILLAGE OF LYONS; JOHN PERRY, individually and as JUSTICE COURT JUDGE of the defendant, VILLAGE OF LYONS; JOHN DASHNEY, individually and as former Police Commissioner of the defendant VILLAGE OF LYONS; RICHARD R. EVANGELIST, individually and as Police Commissioner of the defendant VILLAGE OF LYONS; and JOHN DOE, RICHARD DOE and JAMES DOE, being one or more police officers of the defendant VILLAGE OF LYONS whose real names are presently unknown.

the buildings into compliance. Petitioners² interpreted these and other actions by respondents as a conspiracy to discriminate against petitioners and deprive them of constitutional rights. This general factual description provides a setting for the following discussion of the legal disposition of this case. However, respondents set forth the relevant detailed facts after the legal disposition in rebuttal to some of petitioners' inaccurate factual assertions.

Petitioners commenced this action in the United States District Court for the Western District of New York on October 19, 1977, seeking redress under 42 U.S.C. §§ 1983 and 1985 for alleged constitutional violations committed by respondents. Petitioners alleged that respondents, acting in conspiracy under color of State law, practiced discrimination in attempting to bring the buildings into compliance, and prevented petitioners from exercising their First Amendment rights to freedom of speech, to petition the government for the redress of grievances, and to peaceful assembly.

The late District Court Judge Harold P. Burke granted respondent's Fed. R. Civ. P. 12(b) motion and dismissed petitioners' complaint in 1978 prior to the completion of any discovery, on the grounds that respondent, Village of Lyons, was not a person within the meaning of 42 U.S.C. § 1983, in reliance on the then binding precedent of *Monroe v. Pape*, 365 U.S. 167 (1961). On appeal, the Second Circuit Court of Appeals reversed and remanded on the authority of *Monell v. Dept. of Soc. Serv. of City of N. Y.*, 436 U.S. 658 (1978), which was decided subsequent to the ruling of Judge Burke. The Court of Appeals remanded this

² Petitioners consist of MARK HEIMBACH, individually and as Acting President of CITIZENS COMMITTEE TO SAVE WATER STREET and LEON STOUT, ELAINE STOUT, LENORA SMITH, MARGARET MAHAR, and CAROLYN MORRIS, individually and as members of CITIZENS COMMITTEE TO SAVE WATER STREET.

case "for further proceedings so that the plaintiffs below may be given an opportunity to prove their allegations", *Heimbach v. Village of Lyons*, 597 F.2d 344, 348 (2d Cir. 1979) (A-6).³

After more than seven years of discovery, District Court Judge Michael A. Telesca set this action down for trial for February 4, 1986. In that scheduling order, Judge Telesca directed that all motions were to be made returnable no later than January 1, 1986. Respondents timely filed and served their motion for summary judgment, originally returnable December 31, 1985. Petitioners twice requested and received additional time to submit their answering papers. The motion was rescheduled for January 22, 1986. Petitioners did not file and serve their answering papers and cross-motion for summary judgment until one day before the return date, which was five days after the filing deadline. Significantly, the only affidavit in opposition submitted by petitioners was that of counsel. Substantively, petitioners argued that a question of fact existed, essentially on the basis that strong circumstantial evidence supported their allegations and that resolution of the issues presented ultimately hinged on the credibility of witnesses.

In spite of petitioners' failure to properly or timely file their papers, the District Court reviewed the entire record, including petitioners' papers, and correctly granted summary judgment in favor of respondents. In a comprehensive opinion, the District Court addressed each of petitioners' claims individually and found petitioners had failed to demonstrate any genuine issue of material fact. The District Court dismissed without prejudice petitioner Mark Heimbach's claim that his due process rights were violated when he was arrested, but stated that "at this point, I can see no constitutional violation in plaintiff Heimbach's arrest." (A-21).

³ Appendix at page ____ hereinafter referred to as (A-).

Petitioners then appealed to the Second Circuit Court of Appeals, arguing that the District Court did not view the facts in the light most favorable to petitioners, that it improperly excluded evidence from its consideration, that it misapprehended the facts of the case, and that it misapplied the law. The lengthy and factually complex record was reviewed by the Court of Appeals. Chief Judge Ellsworth A. Van Graafeiland, Judge Thomas J. Meskill, and Judge Jon O. Newman affirmed the judgment of the District Court for the reasons set forth in Judge Telesca's opinion (A-23).

Petitioners now petition this Court for a writ of certiorari on the grounds that the Court of Appeals committed reversible error in affirming the District Court and that the order by the Court of Appeals represents a conflict with other Courts of Appeals which requires this Court's review. It is respondents' position that petitioners are essentially requesting that this Court review the specific facts of this case, which have already been given full consideration by two previous courts. Respondents urge that certiorari be denied on the grounds that the decisions of the District Court and Court of Appeals were correct and fair, that petitioners have not presented an important federal question for this Court to pass on and that no conflict of decisions between the Circuits exist with respect to this case.

The relevant facts follow. In 1976 and 1977 respondents submitted applications through the Wayne County Planning Board for federal assistance under the Community Development Block Grant (hereinafter referred to as "CDBG") program (CA-123).⁴ Public hearings were held prior to the submission of these applications, as required by law (CA-123, 124). In conjunction with

⁴ The factual references designated as (CA-) refer to the exhibits which were filed with respondents' motion for summary judgment in the District Court and which were then sent to the Second Circuit Court of Appeals as part of the Record on Appeal. These exhibits were too voluminous to be attached hereto as part of the Appendix.

these applications, the respondent Village of Lyons Board of Trustees (hereinafter referred to as the "Board") hired the architectural firm of Sherman and Sherman to study and evaluate the historic buildings located in the Water and Broad Street area in the Village (CA-124). Respondent Louis A. Salerno, the Village Building Inspector, accompanied the Sherman and Sherman architect who inspected the buildings and he took notes of State and local building code violations (CA-129). On May 24, 1977, the Village held a public information meeting. At this meeting, Sherman and Sherman presented and explained its report to the Board and the Water and Broad Street area landlords (CA-124, 129, 130).

On July 6, 1977, Mr. Salerno issued notices to remedy violations to landlords of buildings which were out of compliance (CA-130). There is no dispute that these buildings contained many code violations (R-60, Exhibit "L").⁵ These notices were based upon Mr. Salerno's inspection of the buildings and the Sherman and Sherman report (R-60, Exhibit "D"). One of the landlords served with a notice was Travis Spencer, the owner of the property at 40 Water Street (CA-130). The property consisted of three rental units: one on the third floor, one on the second floor, and a storefront on the ground floor (CA-130). At the time the notice was served on Mr. Spencer, only the unit on the second floor was occupied (CA-130). Mr. Spencer agreed not to rent the storefront and third floor unit until he brought the building into compliance with the State Building Construction Code (R-69 at pp. 18-20).

⁵ The factual references designated as (R-) refer to the documents listed in the Index to the Record on Appeal. Since petitioners did not confer with respondents in compiling the Joint Appendix in the Court of Appeals, respondents refer to the Index to the Record on Appeal for identity of the documents cited for factual verification.

During the summer of 1977, petitioner Heimbach and others formed the Citizens Committee to Save Water Street (hereinafter referred to as "CCSWS") to protest the Village's enforcement of the State and local building codes and the Village's alleged misuse of State and federal redevelopment funds. Members of the groups voiced their concerns at public Board meetings in the summer and fall of 1977 (R-45 at p. 10). On August 16, 1977, members of the Eastern Farmworkers Association (hereinafter referred to as "EFWA"), and petitioners Heimbach and CCSWS, began picketing outside the Board meetings and the County of Wayne Department of Social Services in the Village to protest the building code enforcement program (CA-62). Petitioner Heimbach was also associated with the EFWA. The groups picketed all Board meetings, which were held every two weeks, until the middle of November 1977. The groups picketed outside the Department of Social Services every weekday until January or February of 1978 (CA-72-73). They demonstrated with signs, verbal communications, and handed out leaflets throughout these demonstrations (CA-75). During the course of these demonstrations, respondents made absolutely no attempts to either stop or inhibit the demonstrators from exercising their First Amendment rights (CA-134).

On August 17, 1977, Mr. Salerno inspected the premises at 18 Geneva Street at the request of the owner, Mr. Valcho Pikoff. The EFWA was renting the premises at that time and after the inspection, Mr. Pikoff informed the members of the EFWA that they would have to vacate. At the time of his inspection, Mr. Salerno was unaware that the EFWA or anyone else was renting the building. Mr. Salerno inspected the premises because Mr. Pikoff had recently completed repairs and Mr. Pikoff wanted to see if they met code standards (R-69 at pp. 58-60).

Petitioner Heimbach voiced the concerns of the EFWA and CCSWS at at least two private meetings with respondents Mayor

Fabino and the Board of trustees (R-45 at pp. 30, 31, 41-43, 48-50). Mayor Fabino wrote a letter to the Department of Housing and Urban Development, dated September 2, 1977, advising of the Village's concern about the relocation of residents in the affected area (CA-154). Petitioner Heimbach and other members of the two groups demanded that an advisory committee, composed of EFWA and CCSWS members, be established by the Board. Respondents established such a committee. The groups then demanded that the committee be given decision-making power, that is, the right to vote at Board meetings. By letter dated September 12, 1977, Mr. Villani, the Village attorney, advised that the Board was "free to utilize the citizens committee as an advisory group and request and/or rely upon it for such advice as it sees fit", but that the citizens committee could not have any actual decision-making power for the Village (CA-125-127).

On September 12, 1977, Petitioner Heimbach and the EFWA moved into the premises owned by Mr. Spencer at 40 Water Street (CA-83). The EFWA had entered into a lease with Mr. Spencer and the lease term was to begin October 1, 1977, although the building had not been brought into compliance with the State code. Several serious violations of the State Building Construction Code, including inadequate fire separations, remained uncorrected. Mr. Heimbach and the EFWA moved into the building without Mr. Spencer's permission (CA-130, 131).

On that date, Mr. Salerno noticed that people had moved into the storefront, but he was unaware of the identity of the occupants. Mr. Salerno reinspected the premises, to determine whether the violations had been corrected. The reinspection revealed that the violations had not been corrected. Mr. Salerno then served a notice to remedy violations on Mr. Spencer and the EFWA, including Mr. Heimbach, on September 17, 1977. After being served with the notice to remedy, Mr. Spencer requested

Mr. Heimbach and the EFWA to vacate the premises. Mr. Heimbach refused (CA-130, 131).

After waiting several days to see whether the premises would be vacated, Mr. Salerno swore out an Information before the Village Justice John Perry, alleging that Mr. Heimbach had violated the State Building Construction Code by occupying the premises at 40 Water Street without fire separations or a certificate of occupancy. Mr. Salerno attached a supporting deposition from Mr. Spencer to the Information. Justice Perry issued an arrest warrant on September 21, 1977, and Mr. Heimbach was arrested and arraigned before Justice Perry on September 22, 1977 (CA-130, 131). Bail was raised and Mr. Heimbach was released after six hours of incarceration (CA-66, 67). Justice Perry, because he was subsequently named as a defendant in this action, transferred the case to Wayne County Court, and the disposition of the case is presently unknown to respondents (CA-142, 144).

Through leaflets handed out by the members of the CCSWS, the respondents then became aware that the petitioners were threatening litigation against the Village (CA-126 and R-45, Exhibit "E"). Mr. Villani, by letter dated October 7, 1977, advised the Board that further discussions between it, the EFWA and petitioners Heimbach and the CCSWS should take place between their respective counsel (CA-126). Petitioners continued to freely picket outside the Board meetings and the County of Wayne Department of Social Services. This action was subsequently commenced by the petitioners on October 19, 1977.

ARGUMENT

POINT I. WOULD A REVIEW BY THIS COURT CONSTITUTE NOTHING MORE THAN A THIRD JUDICIAL EXAMINATION OF THE FACTS OF THIS CASE WHERE THE FINDINGS OF THE COURTS BELOW ARE FAIR AND SUPPORTED BY SUBSTANTIAL EVIDENCE?

Respondents emphasize two points in opposition to petitioners' request that this Court grant certiorari to review the peculiar facts presented in a case which two previous courts have resolved in favor of respondents. The first point is the Supreme Court has held that "The rule is well settled that in such circumstances, where two courts have agreed, we will not enter upon a minute analysis of the evidence." *Boehmer v. Pennsylvania R.R. Co.*, 252 U.S. 496, 498 (1920). Concurrent findings are not to be disturbed unless plainly without support. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938). This Court does not grant certiorari to review evidence and discuss specific facts. *United States v. Johnston*, 268 U.S. 220 (1925); and see *NLRB v. Hendricks Cty. Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981).

Petitioners' main points in requesting that this Court perform a third judicial review of the facts of this case are that the District Court "did not construe the evidence in its most favorable light in favor the party opposing the motion" and that the District Court did not provide any analysis of how respondents showed the absence of a genuine issue of material fact (See petition at pp. 40, 41).

Respondents submit that these assertions are incorrect. The opinion of the District Court was rendered after a thorough and impartial review of the lengthy facts of this case, including petitioners' papers, which the Court reviewed in spite of their untimely and improper submission. District Court Judge Michael

A. Telesca wrote "This Court should not have to sift through the entire record to discern possible causes of action for plaintiffs who are represented by counsel. Nevertheless, the Court must do so when faced with defendants' summary judgment motion." (A-14).

Further, Judge Telesca clearly addressed throughout his opinion the respondents' burden to establish the absence of a genuine issue of material fact in discussing each of petitioners' claims and found that respondents had fully met their burden. Petitioners then appealed to the Second Circuit Court of Appeals, arguing essentially the same points that they have raised in their petition for writ of certiorari to this Court. After another review of the record, Chief Judge Ellsworth A. Van Graafeiland, Judge Thomas J. Meskill and Judge Jon O. Newman affirmed the judgment of the District Court for the reasons set forth in Judge Telesca's opinion (A-23). Under these circumstances, respondents submit that petitioners are asking this Court to make a third scrutiny of a lengthy record to see if yet another judicial review will substantiate petitioners' claims, where the review by two prior courts had not. This is not a proper basis for requesting this Court to grant certiorari.

The second point respondents emphasize is that petitioners did not argue the theory of law of the case in either the District Court or the Court of Appeals, and therefore, this argument is not properly before this Court. However, respondents will address this point because petitioners make a fundamental mistake in arguing this theory with respect to the circumstances of this case which also highlights why the decisions of the lower courts should not be disturbed.

As was discussed in the statement of the case, the late District Court Judge Harold P. Burke had granted respondents' motion and dismissed petitioners' complaint prior to the completion of any discovery on the grounds that respondent, Village of Lyons,

was not a person within the meaning of 42 U.S.C. § 1983, in reliance on the then-binding precedent of *Monroe v. Pape*, 365 U.S. 167 (1961). On appeal, the Second Circuit Court of Appeals reversed and remanded on the authority of *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658 (1978), which was decided subsequent to the ruling of Judge Burke. The Court of Appeals remanded this case "for further proceedings so that the plaintiffs below may be given an opportunity to prove their allegations", *Heimbach v. Village of Lyons*, 597 F.2d. 344, 348 (2d Cir. 1979) (A-6). After seven years of discovery, the District Court then granted respondents' motion for summary judgment pursuant to Fed. R. Civ. P. 56 and rendered an opinion which addressed each of petitioners' claims individually and found petitioners had failed to demonstrate any genuine issue of material fact.

In Point I of their argument, petitioners assert that the alleged facts in their complaint should somehow be considered the law of the case on the basis that the Court of Appeals upheld the sufficiency of the complaint in 1978 (See petition at pp. 12, 22, 23). At issue here, however, is not the sufficiency of the complaint but rather the two previous courts' interpretations of the facts presented by both parties with respect to the motion for summary judgment. The alleged facts set forth in the complaint were vigorously disputed by respondents in their motion for summary judgment. Furthermore, respondents fully and properly substantiated the factual averments made in support of their motion. After seven years of discovery, petitioners were unable to rebut respondents' proof that no genuine issue of material fact existed in this case which would prevent summary judgment from being granted. The District Court came to this conclusion after a thorough review of the entire record and the Court of Appeals affirmed.

Therefore, respondents urge that this Court deny certiorari for the reasons set forth in *Labor Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, 503 (1951):

This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place, we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. . . In such situations, we should "adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations." *Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544.

POINT II. SHOULD THIS COURT DECLINE TO GRANT A PETITION IN WHICH NO SUBSTANTIAL FEDERAL QUESTION OF IMPORTANCE TO THE PUBLIC WAS RAISED BY PETITIONERS?

Neither the Questions Presented nor the Arguments made by petitioners raise a substantial federal question of sufficient importance to the public to warrant this Court's review. Respondents assert that no federal question was raised because none exists. The facts and circumstances of this case and the application of the law involved simply are not of sufficient consequence to merit certiorari.

The Arguments raised by petitioners turn entirely on the facts of this particular case, and are devoid of significance to anyone outside of this case. Even were this Court to review all the facts in this case and arrive at a different analysis of the evidence than the two previous courts did, such a result would not equal the required public significance so as to merit granting certiorari. Supposing that if, as petitioners seek, a trial were ordered by this Court, the outcome would not even affect all those persons living in the Village of Lyons, much less the general public on a na-

tional scale. The people filling the offices of Mayor, Board of Trustees, and Building Inspector of the Village of Lyons are no longer those persons whom petitioners named in this lawsuit. The persons lawfully evicted from the buildings have found other housing within the Village. Certainly, a monetary award would not affect anyone but the parties. Most importantly, the exact facts of the present case are unlikely to recur in either the Village of Lyons or any other municipality and are too narrow to warrant review by this Court on certiorari.

This Court has made it clear that in the exercise of its discretionary power of review upon writ of certiorari, it does not sit for the benefit of particular litigants. *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923). The case must have "special and important reasons" which reach to a problem beyond the academic or the episodic. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). Finally, however important the case may be to the petitioner, writ of certiorari will not be granted except in cases involving principles, the settlement of which is of gravity and importance to the public as distinguished from the parties. *Fields v. United States*, 205 U.S. 292 (1907); see also *Layne & Bowler Corp. v. Wester Well Works, Inc.*, 261 U.S. 387 (1923). Therefore, respondents urge that the writ of certiorari be denied in this case.

POINT III: DOES THE SECOND CIRCUIT COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S OPINION REPRESENT A CONFLICT OF AUTHORITY WITH OTHER COURTS OF APPEAL REQUIRING SETTLEMENT BY THIS COURT?

In the second of the Questions Presented by petitioners, they allege that the Second Circuit Court of Appeals' affirmance of the District Court's opinion constitutes a conflict of authority with other Courts of Appeals which requires settlement by this Court. However, the only mention of this proposition in their ar-

gument is found in Footnote "22", which states that the Circuit Courts agree with the fundamental proposition that a District Court must resolve all ambiguities and draw all reasonable inferences in favor of the party against whom summary judgment is sought (See petition at pp. 41, 52). None of the cases cited by the plaintiff in Footnote "22" are factually on point, however, respondents submit that a reading of each clearly demonstrates that the Second Circuit Court of Appeals is entirely in agreement with the judicial summary judgment standard of review set forth in those cases. In fact, the Second Circuit Court of Appeals' affirmation of the District Court's opinion is very much in harmony with the other Courts of Appeals and any allegation by petitioners of a conflict is merely illusory.

Factually, not one of the cases cited by petitioners involve a conspiracy to deprive persons from exercising their First Amendment rights. *Kim v. Coppin State College*, 662 F.2d 1055 (4th Cir. 1981) involves a discrimination in compensation suit where the District Court entered a directed verdict against plaintiffs. *Alvey v. United Air Lines, Inc.*, 494 F.2d 1031 (D.C. Cir. 1974) is a defamation and false imprisonment suit. *Ramirez v. National Distillers and Chem. Corp.*, 586 F.2d 1315 (9th Cir. 1978) is an employment discrimination lawsuit. *Dreher v. Sielaff*, 636 F.2d 1141 (7th Cir. 1980) is an attorney access case. *Bolack v. Underwood*, 340 F.2d 816 (10th Cir. 1965) is an action to quiet title. And finally, *Experimental Engineering Inc. v. United Technologies Corp.*, 614 F.2d 1244 (9th Cir. 1980) is a breach of contract case where defendants moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief could be granted. The fundamental standards of law and summary judgment review set forth by these Circuit Courts are in unity with the Second Court of Appeals' affirmation of the District Court's opinion in the case at bar.

Where there is no conflict between the decisions of State and federal courts or between those of federal courts of different circuits, certiorari should not be granted. *Fields v. United States*, 205 U.S. 292 (1907). Where it appears that the asserted conflict and decisions arise from differences in states of fact, and not in the application of a principal of law, the writ of certiorari should be dismissed as improvidently granted. *Wisconsin Electric Co. v. Dumore Co.*, 282 U.S. 813 (1931). Certiorari should be granted only where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals. *Rice v. Sioux City Cemetery*, 349 U.S. 70 (1955). Therefore, it is submitted that no conflict of authority exists between the order of the Second Circuit Court of Appeals in this case and the decisions concerning summary judgment standard of review by the other Circuit Courts of Appeals and certiorari in this case should be denied.

Respectfully Submitted,

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Of Counsel:
SUSAN A. EBERLE



APPENDIX

A-1

In The
United States Court of Appeals
For the Second Circuit

No. 610 — August Term, 1978.

(Submitted January 19, 1979

Decided April 26, 1979.)

Docket No. 78-7467

MARK HEIMBACH, individually and as Acting President of
CITIZENS COMMITTEE TO SAVE WATER STREET,
Plaintiff-Appellant.

vs.

VILLAGE OF LYONS (WAYNE COUNTY, NEW YORK),
et al.,
Defendants-Appellees.

Before:

WATERMAN, FEINBERG and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment of the United States District Court for the Western District of New York (Burke, J.) dismissing this suit for damages and declaratory and injunctive relief brought under 42 U.S.C. §§ 1983 and 1985.

Dismissal order affirmed as to the action for damages against the village justice; as to all other defendants-appellees, reversed and remanded for further proceedings below.

MARK HEIMBACH, Lyons, New York, Appellant,
pro se.

JOSEPH V. McCARTHY, Brown, Maloney, Gallup,
Roach & Busteed, P.C., Buffalo, New York, for
Defendants-Appellees.

PER CURIAM:

The plaintiff-appellant, Mark Heimbach, individually and as Acting President of Citizens Committee to Save Water Street, appeals from a judgment of the United States District Court for the Western District of New York (Burke, J.) dismissing this suit brought under 42 U.S.C. § 1983 and 1985. The plaintiffs below are allegedly residents of the Village of Lyons and members of organization called the "Eastern Farm Workers Association" (hereinafter "EFWA") and "Citizens Committee to Save Water Street" (hereinafter "CCSWS"). The defendants-appellees are the Village of Lyons, members of its present and past board of trustees, the village Justice of the Peace, the village Chief of Police, the village Building Inspector, and certain fictitious defendants. We affirm the dismissal order as to the action for damages against Justice John Perry; as to all other defendants-appellees, we reserve and remand for further proceedings below.

The complaint alleged that the defendants acted in concert under color of state law so as to prevent, and that they, through a series of harassments and illegal evictions and arrests, effectively did prevent, the plaintiffs from exercising their first amendment

rights to freedom of speech, to petition the government for the redress of grievances, and to peaceful assembly. More specifically, the plaintiffs alleged that efforts have been illegally made by the defendants to evict low-income people from their homes and buildings on Water Street in the Village of Lyons, so that the Lyons Village Government could redevelop the area for business and commercial interests. In furtherance of that goal, they alleged that the defendants harassed and illegally evicted the EFWA and CCSWS from premises on Water Street in the Village of Lyons. They alleged further that the defendants harassed and illegally arrested Mark Heimbach, the operations manager of the EFWA and the Acting President of the CCSWS, for a supposed misdemeanor pursuant to a section of the State Building Construction Code which has no provision for criminal penalties, and, in particular, has no penalties applicable to a tenant such as appellant Heimbach. The plaintiffs sought damages and declaratory and injunctive relief.

In dismissing the suit against the Village of Lyons, Judge Burke correctly relied upon the then binding precedents of *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961), and *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), and ruled that the "Village of Lyons is not a person within the meaning of 42 U.S.C. 1983." However, subsequent to the ruling of Judge Burke, the U.S. Supreme Court decision in *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 98 S.Ct. 2018 (decided June 6, 1978), overturned those precedents and held that the legislative history of the Civil Rights Act makes it clear that a municipality is indeed a "person" under § 1983. As the appellant alleges actions implementing an official policy of harassment and encroachment upon first amendment rights, he states a claim for damages and injunctive relief against the village. *Monell, supra*, 98 S.Ct. at 2036. *Cf. Turpin v. Mailet*, 579 F.2d 152, 164 (2d Cir. 1978), *vacated and remanded in light of Monell sub nom. West Haven v. Turpin*, 47 U.S.L.W. 3368 (U.S.

Nov. 27, 1978) (damage action maintainable where actions "authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level.")

Judge Burke further ruled that the individual defendants are immune from suit. In so ruling, the district court judge was correct as to the suit for damages against the Village Justice Court Judge, John Perry, inasmuch as Justice Perry, by signing a criminal arrest warrant against appellant Heimbach, was not acting "in the 'clear absence of all jurisdiction.' [Bradley v. Fisher], 13 Wall. [80 U.S. 335, 20 L.Ed. 646 (1872)], at 351." *Stump v. Sparkman*, 435 U.S. 349, 357, 98 S.Ct. 1099, 1105 (1978). Justice Perry does have jurisdiction over criminal matters under New York State law, C.P.L. § 120.20(1). As the Court stated in *Bradley v. Fisher*, supra, 80 U.S. (13 Wall.) at 352:

(If . . . a judge of a criminal court, invested with general criminal jurisdiction over offences committed within a certain district, should hold a particular act to be a public offence, which is not by the law made an offence, and proceed to the arrest and trial of a party charged with such act, . . . no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him, for these are particulars for this judicial consideration, whenever his general jurisdiction over the subject-matter is invoked.

Thus, while Justice Perry may have acted maliciously in signing a criminal arrest warrant against appellant Heimbach, as appellant maintains, the justice is nonetheless immune from suit for damages for his actions. The justice is not immune, however, from suit for injunctive relief and, accordingly, should not be dismissed from this action. *See Allee v. Medrano*, 416 U.S. 802, 819-20, 94 S.Ct. 2191, 2202, 40 L.Ed.2d 566 (1974); *Person v. Association of Bar of City of New York*, 554 F.2d 534, 537 (2d Cir.), cert. denied, 434 U.S. 924 (1977); *Littleton v. Berbling*, 468 F.2d 389, 395-414 (7th Cir. 1972) rev'd on other grounds sub nom.

O'Shea v. Littleton, 414 U.S. 488, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Erdmann v. Stevens*, 458 F.2d 1205, 1210 (2d Cir.), *cert. denied*, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d 147 (1972); *Boddie v. State of Connecticut*, 286 F.Supp. 968, 971 (D. Conn. 1968), *rev'd on other grounds but aff'd sub silentio on limitation on judicial immunity*, 401 U.S. 371, 91 S.Ct. 780 (1971). Moreover, inasmuch as appellant Heimbach alleged a pattern of harassment and alleged that a criminal prosecution was initiated against him in bad faith without hope of conviction and which resulted in a chill upon the exercise of his first amendment rights, his allegations are sufficient to remove any bar to injunctive interference with state court criminal prosecutions. *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746 (1971); *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

The other village officials do not share Justice Perry's absolute immunity from suit for damages; rather, they are entitled merely to a qualified good faith immunity. *Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Pierson v. Ray*, 386 U.S. 547, 87 S.Ct. 1213 (1967).

Plaintiffs here have alleged bad faith and improper and discriminatory motives on the part of the police officers who served a facially invalid warrant upon appellant Heimbach. Hence, those cases relied upon by the appellees dealing with "the defenses of good faith purpose and reasonable grounds," *Hanna v. Drobnick*, 514 F.2d 393, 397 (6th Cir. 1975), are inapposite and do not warrant the dismissal of this action against the officers. See *Pierson v. Ray*, *supra*; *Tucker v. Maher*, 497 F.2d 1309, 1313 (2d Cir. 1974); *Ellenburg v. Shepherd*, 304 F. Supp. 1059, 1061-62 (E.D. Tenn. 1966), *aff'd*, 406 F.2d 1331 (6th Cir. 1968), *cert. denied*, 393 U.S. 1087, 89 S.Ct. 878 (1969). See also *Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 616 (1871); *Guzman v. West-*

ern State Bank of Devils Lake, 540 F.2d 948, 951-52 (8th Cir. 1976).

Similarly, plaintiffs' allegations of bad faith in the administration of the State Building Construction Code and the zoning ordinances preclude dismissal of the actions against the other village officials on the grounds of a qualified immunity. Accepting the allegations in the complaint as true, as we must in our review of the district court's dismissal, the village officials acted neither with a good faith belief in the lawfulness of the actions taken nor with reasonable grounds so to believe. Thus, dismissal of the suit against the village officials below was erroneous. *Scheuer v. Rhodes*, *supra*, 416 U.S. at 247-48, 94 S.Ct. at 1692; *Wood v. Strickland*, *supra*, 420 U.S. at 322, 95 S.Ct. at 1001; *Laverne v. Corning*, 522 F.2d 1144, 1150 (2d Cir. 1975).

Accordingly, we affirm the dismissal of the damage claims against Village Justice Perry but reverse the remainder of the judgment of the district court and remand for further proceedings so that plaintiffs below may be given an opportunity to prove their allegations.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

MARK HEIMBACH, Individually and as
Acting President of CITIZENS COM-
MITTEE TO SAVE WATER STREET, et
al

Plaintiffs

—vs—

VILLAGE OF LYONS, et al

Defendants

DECISION
and ORDER

Civ. 77-562T

This action, one of the oldest on the Court's docket, was brought in 1977 under 42 U.S.C. §§ 1983 and 1985 seeking redress for alleged constitutional violations committed by defendants in their efforts to upgrade a section of the Village of Lyons known as the Water Street area. Pending before me is defendants' motion for summary judgment and for attorneys fees. Also pending is plaintiff's cross-motion for summary judgment and attorneys fees, which, as will be set forth fully below, was not timely filed. For the reasons set forth below, defendants' motion for summary judgment is granted in all respects but one, and their motion for attorneys fees is denied. Plaintiffs' cross-motion for summary judgment and attorneys fees is denied.

FACTS

In 1976 and 1977 defendant Village of Lyons submitted applications through the Wayne County Planning Board for federal assistance under the Community Development Block Grant (CDBG) program. In conjunction with these applications, the

Village Board of Trustees hired the architectural firm of Sherman and Sherman from Newark, New York to study and evaluate the historic buildings located in the Water and Broad Street area in the Village. The Sherman and Sherman architect who inspected the buildings was accompanied by the Village Building Inspector, defendant Louis A. Salerno, who took notes on apparent violations of State and local building codes. Sherman and Sherman presented its report to the Village Board of Trustees and to landlords from the Water and Broad Street area, at a public meeting on May 24, 1977.

In approximately July of 1977, defendant Salerno issued notices to remedy violations to various landlords of buildings which were out of compliance. One of the landlords served with a notice was a Travis Spencer, owner of a storefront later rented by plaintiff Citizens Committee to Save Water Street. On August 16, 1977, plaintiff Mark Heimbach and a group with which he was affiliated, the Eastern Farmworkers Association, began picketing outside the Village Board meetings to protest the building code enforcement program, which they felt was directed at removing poor and minority persons from the Broad and Water Street areas. The next day defendant Salerno inspected the premises they were then renting at 18 Geneva Street and the group's then-landlord (Mr. Valcho "Vic" Pikoff) notified them that they would have to vacate. Mr. Salerno states that his inspection was done at the landlord's request (because the landlord had recently completed some repairs and wanted to see if they met code standards), and that he (Mr. Salerno) did not know that Eastern Farmworkers (or anyone else) was renting the building at that time.

During that summer, plaintiff Heimbach and others formed the Citizens Committee to Save Water Street to "expose [the] defrauding of our people" by the Village in its alleged misuse of federal and State redevelopment funds to destroy the economic

viability and vitality of the community. After hearing the group's concerns at public Board meetings and at least two private informal meetings, Mayor Fabino notified the Department of Housing and Urban Development (HUD) on September 2, 1977 that the Village was concerned about the relocation of any residents in the affected area. On September 12, 1977 Village Attorney Anthony J. Villani wrote to the Board of Trustees that the Board was "free to utilize the [C]itizens [C]ommittee as an advisory group," but that the Citizens Committee could not have any actual decision-making power for the Village.

On September 10, 1977 the Eastern Farmworkers Association entered into a lease with Travis Spencer for the premises at 40 Water Street, Lyons, New York. The lease term was to begin October 1, 1977. Apparently, as of September 10, the defects noted in Mr. Spencer's July 6, 1977 Notice to Remedy Violation (inadequate fire separations, egress, light, and ventilation, and loose bricks) had not been entirely corrected. It appears that Mr. Spencer intended to correct these deficiencies before October 1; nevertheless, on or about September 12, the Eastern Farmworkers Association occupied the premises. Plaintiff Heimbach contends that the Eastern Farmworkers' Association moved in with Mr. Spencer's permission, and that Mr. Spencer had given them a key. Mr. Spencer, however, subsequently provided Building Inspector Salerno with a written statement which makes it appear that he first learned about the premises being occupied from defendant Salerno.

On September 17, 1977, defendant Salerno served a Notice to Remedy Violation on the Eastern Farmworkers Association as tenant of 40 Water Street. The Notice stated that the Farmworkers Association was in violation of the State Building Construction Code and local zoning ordinances because it was occupying the premises without a Certificate of Occupancy, and ordered the Farmworkers Association to remedy the conditions

at once. By all accounts, plaintiff Heimbach refused to vacate the premises. After waiting several days to see whether the premises would be vacated, Building Inspector Salerno swore out an Information before Justice Court Judge John Perry (a defendant in this action), alleging that plaintiff Heimbach had violated the State Building Construction Code on September 21, 1977 by occupying the premises at 40 Water Street without fire separations or a Certificate of Occupancy. Attached to his Information was the statement from Travis Spencer which made it appear that Mr. Heimbach did not have his permission to move in, and that he (Mr. Spencer) had not had an opportunity to install the fire separations and obtain a Certificate of Occupancy. Justice Perry issued an arrest warrant for plaintiff Heimbach on September 21, and on September 22, plaintiff Heimbach was arrested and arraigned before Justice Perry. A few hours later, bail was raised and plaintiff Heimbach was released. The case has never been prosecuted further; because he was a defendant in this case, Justice Perry transferred the case to Wayne County Court, where it remains to this day.

Through leaflets handed out by the Citizens Committee, the Village Board then became aware that plaintiffs were threatening litigation. On October 7, 1977, Village Attorney Villani advised the Village that further discussions between it and plaintiff Heimbach or the Eastern Farmworkers Association should take place between their respective counsel. Defendant Fabino resigned from the office of Mayor for personal reasons on September 21, 1977, and was succeeded by the late John C. Dashney, also a defendant in this action.

On October 19, 1977, the complaint in this action was filed, along with a request for a temporary restraining order. On October 21, 1977, my predecessor Judge Harold P. Burke issued an order temporarily restraining defendants from: arresting any plaintiffs for being present at 40 Water Street, or for alleged vio-

lations of the New York State Building Construction Code or any related provisions of the Village Municipal Code; issuing any arrest warrant or other civil or criminal process which would have the same effect, or which would abridge or threaten the First Amendment rights of plaintiffs, or continuing with the criminal proceeding against Mark Heimbach.

Later, in response to a motion by defendants, Judge Burke on February 17, 1978 dismissed the action against all defendants on the basis of the Supreme Court's holding in *Monroe v. Pape*, 365 U.S. 167 (1961). Subsequent to Judge Burke's decision, the Supreme Court reversed *Monroe v. Pape* in *Monell v. Department of Social Services*, 436 U.S. 658 (1978). On the basis of *Monell*, the Second Circuit reversed Judge Burke, in a decision reported at 597 F.2d 344 (1979). The Second Circuit dismissed the claim for damages against Justice Perry, on the ground of judicial immunity. The case now comes before me, after three changes of attorneys by plaintiffs and seven more years of discovery, on the motion by the remaining defendants for summary judgment, and on plaintiffs' late-filed cross-motion for summary judgment.

DISCUSSION

I.

Defendants' motion for summary judgment was filed on December 19, 1985 and was originally returnable December 31, 1985. Because that date was not a motion day for the Court, the return date was adjourned, and because plaintiffs requested additional time to submit their answering papers, the adjourned date was set as January 22, 1986. Under the Local Rules of Practice of the United States District Court for the Western District of New York, plaintiffs' papers should have been served and filed three days prior to the return date. Local Rule 14(C). Under Fed. R. Civ. P. 6(a), in computing any period of time prescribed or allowed by the local rules of any district court, when the period of

time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays are excluded in the computation. Under these Rules, plaintiffs' answering papers and memoranda should have been served and filed by January 16, 1986. In addition, the Guidelines for Practice and Procedure before this Court, Section V(C), require that opposing papers for a motion be filed and served three *business* days prior to the return date of the motion, which would likewise have been January 16, 1986.

Plaintiffs' answering papers were filed with the Court five days late, on January 21, 1986, the day before the return date. Accordingly, this Court is justified in declining to consider the opposition papers on the ground that they were untimely filed, and in treating defendants' summary judgment motion as unopposed. *Davidson v. Keenan*, 740 F.2d 129, 132 (2d Cir. 1984). Plaintiffs made no attempt to communicate to this Court that the papers would be untimely filed, nor did they seek an extension of time to file their papers. The only excuse offered by plaintiffs' counsel at oral argument was that January 20th was a Federal holiday; in light of Fed. R. Civ. P. 6(a)'s specific exclusion of Martin Luther King Jr.'s birthday from the computation of time, that is no excuse at all.

II.

Even if plaintiff's papers had been timely submitted, they would have been defective for another procedural reason. Fed. R. Civ. P. 56(e) requires that supporting and opposing affidavits be made on personal knowledge, set forth such facts as would be admissible in evidence, and show affirmatively that the affiant is competent to testify to the matters stated therein. Time and time again, the Second Circuit has held that an attorney's affidavit which is not based on first-hand knowledge is not entitled to any weight, and is insufficient to oppose a summary judgment motion. *Chandler v. Coughlin*, 763 F.2d 110, 113-14 (2d Cir. 1985);

Wyler v. United States, 725 F.2d 156, 160 (2d Cir. 1983); *United States v. Bosurgi*, 530 F.2d 1105, 1111 (2d Cir. 1976). Nor is an attorney's statement of disputed facts a substitute for an affidavit based on personal knowledge. *Zanghi v. Incorporated Village of Old Brookville*, 752 F.2d 42, 47 (2d Cir. 1985); *L & L Started Pulletts, Inc. v. Gourdine*, 762 F.2d 1, 3-4 (2d Cir. 1985). Even in cases involving alleged discriminatory intent, in which summary judgment is generally not appropriate, a plaintiff must still come forward with evidence meeting the requirements of Rule 56(e), to withstand a summary judgment motion by defendants. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160-61 (1970); *Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir. 1978), *cert. denied*, 439 U.S. 861 (1978); *see also*, *Markowitz v. Republic National Bank of New York*, 651 F.2d 825, 828 (2d Cir. 1981).

Plaintiffs in this case submitted only a three page attorney's affirmation in response to the motion. Along with the affirmation, a memorandum of law was submitted containing a long list of allegedly uncontroverted facts in support of plaintiffs' cross-motion for summary judgment, and also containing voluminous exhibits. Similar submissions have been held to be insufficient to support the granting of summary judgment, and to be of "no more use" in opposing a grant of summary judgment. *Schiess-Froriep Corp. v. S.S. Finnsailor*, 574 F.2d 123, 126-27 (2d Cir. 1978).

Accordingly, even if plaintiffs' papers had been timely submitted, they would be insufficient to oppose an award of summary judgment to defendants.

III.

Nevertheless, even though plaintiffs have not submitted evidentiary matter to establish that there is indeed a genuine issue for trial, defendants must still establish the absence of a genuine issue concerning any material fact, if they are to prevail on their

summary judgment motion. *Zanghi v. Incorporated Village of Old Brookville*, *supra*, 752 F.2d at 47; 6 J. Moore, *Moore's Federal Practice*, ¶ 56.22(2), p. 56-1344 and ¶ 56.23, pp. 56-1389-1390 (2d Ed. 1985). Defendants have done so in this case.

It is difficult to decipher exactly what plaintiffs in this case have alleged. They have presented the Court with an undifferentiated collection of facts, and ask the Court to find that these facts establish a conspiracy by defendants to violate various Constitutional rights of plaintiffs, specifically First Amendment, Due Process, and Equal Protection rights. This Court should not have to sift through the entire record to discern possible causes of action for plaintiffs who are represented by counsel. Nevertheless, the Court must do so when faced with defendants' summary judgment motion.

A.

The plaintiffs attempt to tie their various constitutional claims together under the umbrella of an alleged conspiracy by defendants to violate these rights. According to plaintiffs, the Village was attempting to drive out poor and minority residents through its use of the CDBG money and strict code enforcement. Defendants have controverted this argument in affidavits supplied by defendants Fabino, Lese and Salerno that there was no conspiracy, and that they were acting in good faith to improve the Water Street area (without necessarily driving out poor or minority residents) when they committed the acts complained of.

Where a plaintiff fails to produce any specific facts whatsoever to support a conspiracy allegation, a district court may, in its discretion, refuse to permit discovery and grant summary judgment. Something more than a fanciful allegation is required to justify denying a motion for summary judgment when the moving party has met its burden of demonstrating the absence of any genuine issue of material fact.

* * *

Courts must be particularly cautious to protect public officials from protracted litigation involving specious claims.

Contemporary Mission, Inc. v. U.S. Postal Service, 648 F.2d 97, 107 (2d Cir. 1981). *See also*, *Sommer v. Dixon*, 709 F.2d 173, 174-75 (2d Cir. 1983), *cert. denied*, 464 U.S. 857 (1983); *Batista v. Rodriguez*, 702 F.2d 393, 397 (2d Cir. 1983); and *Koch v. Yunich*, 533 F.2d 80, 85 (2d Cir. 1976) (in pleadings alleging conspiracy, facts forming the basis for the conspiracy must be averred with particularity).

The record contains nothing more than plaintiff Heimbach's conclusions that defendants were conspiring to violate his civil rights. He states in his deposition that defendants were pressuring his landlords to evict him because of his organizations' political activities (Deposition Transcript pgs. 11-21, 51, 62-64, 73-77, 83-85, 88-89). Defendant Salerno refutes these allegations in his deposition and his affidavit submitted with defendants' summary judgment motion. He states that Heimbach's first landlord, Mr. Pikoff, approached him to do an inspection of the premises occupied by the Eastern Farmworkers Association, because he (Mr. Piloff) [sic] had recently completed repairs and wanted to ensure that the building was now in compliance. Mr. Salerno states further that the notice of violation served upon Heimbach's second landlord, Mr. Spencer, was served in July, well before Mr. Spencer even met plaintiff Heimbach, and that enforcement action was taken when plaintiff Heimbach occupied the premises because Mr. Spencer had previously agreed not to rent out the premises until the violations were corrected and a certificate of occupancy was obtained.

As set forth above, plaintiffs have failed to submit timely or sufficient opposing papers to the motion. In addition, despite seven years' opportunity for discovery, the record contains nothing (such as an affidavit or deposition transcript from Mr. Pikoff

or Mr. Spencer) which would support plaintiff Heimbach's conclusions that they were being pressured because his organizations were their tenants.

Similarly, plaintiff Heimbach in his deposition refers to evictions of a Mr. Rodriguez (Transcript at 47), and an elderly amputee (Transcript at 72-73). Yet these evictions were not carried out by the Village, but by particular landlords who chose not to bring their buildings up to code standards. No affidavits from the landlords, the tenants, or any other individuals are submitted to support plaintiff Heimbach's conclusion that these or any other evictions were illegal, or were somehow part of a conspiracy directed against the Citizens Committee. Likewise, plaintiff Heimbach relates conversations he had with defendant Peter Stirpe, a Village Board member who allegedly told plaintiff Heimbach that the Village Board, defendant Salerno, and the Village Attorney were pushing the evictions (Transcript at 54-55). Evidently, no attempt was made to depose Mr. Stirpe, and defendants Salerno and Fabino have denied the allegation.

Other than plaintiff Heimbach's conclusions during his deposition, there are simply no facts in the record to support plaintiffs' allegations that defendants conspired to violate their civil rights. His unsupported conjectures are not enough to withstand a summary judgment motion. See *Quarles v. General Motors Corp.*, 758 F.2d 839, 840 (2d Cir. 1985); *Gatling v. Atlantic Richfield Co.*, 577 F.2d 185, 188 (2d Cir. 1978); *cert. denied*, 439 U.S. 861 (1978). Defendants have met their burden of showing that no material issue of fact remains as to this question.

B.

According to plaintiffs' Memorandum of Points and Authorities, the gravamen of plaintiffs' complaint is that defendants attempted to and did infringe plaintiffs' First Amendment rights to freedom of speech, petition, and peaceful assembly. Defendants

code enforcement program and arrest of Mark Heimbach, it is alleged, were in retaliation for plaintiffs' picketing and advocating the rights of minorities and poor people. Defendant Salerno's affidavit, and the affidavits and deposition transcripts of the other defendants, vigorously controvert this assertion, and point out that at no time did any defendant interfere with the picketing of the Village Board meetings.

On their face, the code enforcement program and the arrest of plaintiff Heimbach for a code-related misdemeanor are not directed at speech. Thus, these actions do not violate the First Amendment if they further an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest. *United States v. Albertini*, 105 S.Ct. 2897, 2906 (1985), quoting *United States v. O'Brien*, 391 U.S. 367, 377 (1968). It is beyond question that the building code enforcement program furthers an important or substantial governmental interest of protecting the public from unsafe buildings. *Burtneiks v. City of New York*, 716 F.2d 982, 987 (2d Cir. 1983); see also, *English v. Town of Huntington*, 448 F.2d 319, 323 (2d Cir. 1971).

Miserable and disreputable housing conditions may do more than spread disease and crime and immorality. They may also suffocate the spirit by reducing the people who live there to the status of cattle. They may indeed making living an almost insufferable burden. They may also be an ugly sore, a blight on the community which robs it of charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.

Berman v Parker, 348 U.S. 26, 32-33 (1954). Secondly, the plaintiffs do not attempt to argue that this governmental interest itself is somehow related to the suppression of free expression. Finally,

plaintiffs do not argue that the enforcement of building codes intrinsically results in an incidental restriction on alleged First Amendment freedoms that is somehow greater than is essential to the furtherance of an interest. (Plaintiffs' argument that the building codes were being selectively applied to them because of their expression of their political views will be addressed below.)

Accordingly, defendants have met their burden of demonstrating that no material issue of fact exists, and that they are entitled to summary judgment as to plaintiffs' claim that defendants violated their First Amendment rights.

C.

Plaintiffs in their complaint also allege that the building codes have been selectively enforced against them and their landlords, not only because they represent the interests of minorities and poor persons, but also because of their picketing and other activities protected by the First Amendment. Presumably this argument is premised on the rationale underlying *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and subsequent cases, that a law which on its face is constitutional can become unconstitutional under the Equal Protection Clause of the Fourteenth Amendment if those in charge of administering it enforce it selectively. See *English v. Town of Huntington*, 448 F.2d 319, 323 (2d Cir. 1971).

To qualify for "strict scrutiny" under the Equal Protection Clause, plaintiffs must show both proof that a racially discriminatory purpose has been a motivating factor in official action, and proof that the official action results in a racially disproportionate impact. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264-266 (1977). Beyond their conclusory allegations, plaintiffs have introduced absolutely no proof of either. They have introduced no clear pattern, unexplainable on grounds other than race, as in the *Yick*

Wo case. They have introduced no statistical evidence of the type introduced in *Washington v. Davis*, 426 U.S. 229 (1976), that the burden of the code enforcement program fell disproportionately upon minorities. *See also Jefferson v. Hackney*, 406 U.S. 535 (1972). They have introduced no proof of a racially discriminatory motive, and there are simply no facts from which a court can infer a prejudiced motive, on the part of the defendants. Accordingly, plaintiffs are not entitled to strict scrutiny under the Equal Protection Clause because they represent minority interests.

Nor are plaintiffs entitled to strict scrutiny because they represent the interests of poor persons. Discrimination on the basis of wealth has never by itself provided an adequate basis for invoking strict scrutiny under the Equal Protection Clause. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28-29 (1973).

Because no suspect class has been implicated, plaintiffs' claim of selective enforcement, even though it is arguably based on the exercise of plaintiffs' First Amendment rights, must be judged under ordinary equal protection standards. *Wayte v. United States*, 105 S.Ct. 1524, 1531 (1985). These standards require plaintiffs to show both that the enforcement system had a discriminatory effect and that it was motivated by a discriminatory purpose. *Id.* Very simply, throughout the record, plaintiffs have shown neither, whether based on race (as set forth above), poverty, First Amendment expression or any other classification. There is no indication that the code enforcement program was directed at anything other than improving the conditions of the buildings in the Water and Broad Street area, and was applied without regard to race, income, or political views.

Accordingly, there being no issue of material fact, defendants have met their burden on this issue under Rule 56.

D.

Plaintiffs also allege in their complaint that defendants' action denied them due process. The Court will treat separately plaintiffs' allegations concerning code enforcement generally, and plaintiffs' allegations concerning defendants' actions against Mark Heimbach in particular.

With respect to the code enforcement in general, plaintiffs point to a decision by the late New York State Supreme Court Justice Robert P. Kennedy in *Matter of Crisci v. Dashney*, Index No. 15574 (S.Ct. Wayne County, June 1, 1978), in which Justice Kennedy set aside a code enforcement proceeding against Mr. Crisci, a landlord, on the ground that the Village had not complied with the procedures set forth in its own code. Mr. Crisci is not a party to this action, however, nor have plaintiffs bothered to allege whether or not they (or any of their members) are property owners who have been served with a notice to remedy and then denied due process by the defendants (other than plaintiff Heimbach's interest as a tenant, which will be addressed below). This presents obvious standing problems, *Warth v. Seldin*, 422 U.S. 490 (1975); *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984), which the parties have not briefed. More importantly, however, it is a failure of proof by plaintiffs on the question whether they even have a property interest subject to protection under the Due Process Clause. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 58-59 (2d Cir. 1985). There being no evidence that plaintiffs were deprived of any property interest without due process by the Village's code enforcement program generally, defendants are entitled to summary judgment on this issue.

Plaintiff Heimbach also claims that he was personally denied due process when he was jailed for building code violations, even though he was only a tenant. He points to New York Multiple

Residence Law § 306, which requires both a hearing and notice of right to hearing for one charged with building code violations.

Defendants counter that plaintiff Heimbach had no right to a hearing because he was arrested for failing to vacate a building for which no certificate of occupancy had been issued. This, defendants argue, constitutes a violation of the New York State Building Construction Code § 385, and thus a “disorderly conduct” violation of Village of Lyons Municipal Code § 17.100 and § 20.2006, subd. 3 of the N.Y. Village Law, not just a building code violation.

At this point, I can see no Constitutional violation in plaintiff Heimbach’s arrest. On its face the warrant appears to have been properly issued by Justice Perry (who, as the Second Circuit noted, is entitled to immunity from plaintiffs’ damage claim). It no longer appears, as alleged in the complaint, that the prosecution was initiated in bad faith, without hope of conviction, to chill the exercise of Mr. Heimbach’s First Amendment rights. *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir. 1979)¹ Should the State court determination of pertinent state law present the federal Constitutional issue in a different posture, plaintiff Heimbach is free to commence a separate action alleging a Constitutional violation.

IV.

Along with their motion for summary judgment, defendants have argued that they are entitled to an award of attorneys fees under 42 U.S.C. § 1988, as the prevailing party in this action. Defendants are entitled to attorneys fees only if plaintiffs’ action

¹ I note that neither party has argued since the Second Circuit’s 1979 decision that I should abstain from making a determination on the constitutional claim under *Younger vs. Harris*, 401 U.S. 37 (1971), or *Samuels vs. Mackell*, 401 U.S. 66 (1971).

was frivolous, unreasonable, or without foundation, or if plaintiffs continue to litigate after it clearly became so. *Bonar v. Ambach*, 771 F.2d 14, 20 (2d Cir. 1985). Although plaintiffs were unable to prove the conspiracy they alleged, I cannot say that their action was frivolous, unreasonable, or without foundation so as to justify the imposition of attorneys fees. Obviously the allegations were at least serious enough to warrant the Second Circuit's 1979 reversal of Judge Burke's dismissal of the case.

Plaintiffs' request for attorney fees contained in their cross-motion is denied, as plaintiffs were not the prevailing party in this action.

CONCLUSION

Accordingly, for the reasons set forth above, summary judgment is granted to defendants as to all of the claims for relief set forth in plaintiffs' complaint, except for plaintiff Mark Heimbach's claim that his due process rights were violated when he was arrested on September 22, 1977. That claim is dismissed without prejudice.

Plaintiffs' cross-motion for summary judgment is denied, along with their request for attorneys fees.

ALL OF THE ABOVE IS SO ORDERED.

MICHAEL A. TELESCA
United States District Judge

DATED: Rochester, New York
February 10, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York on the 23rd day of September, one thousand nine hundred and eighty-six.

P r e s e n t : HONORABLE ELLSWORTH A. VAN
GRAAFEILAND,
HONORABLE THOMAS J. MESKILL,
HONORABLE JON O. NEWMAN,

Circuit Judges.

MARK HEIMBACK, Individually and as)
acting President of CITIZENS COMMIT-)
TEE TO SAVE WATER STREET, et al)

Plaintiffs-Appellants,)

v.)

VILLAGE OF LYONS, et al)

Defendants-Appellees.)

Docket No.
86-7207

This is an appeal from a judgment of the United States District Court for the Western District of New York, Telesca, *J.*, granting summary judgment against all plaintiffs with respect to their allegation of concerted action to deprive them of civil rights in violation of 42 U.S.C. § 1983 (1982), their First Amendment claims and their selective prosecution in violation of the equal protection claims. Judge Telesca also granted summary judgment against all plaintiffs except plaintiff Heimbach with respect to

their due process claims and dismissed Heimbach's due process claim without prejudice.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The judgment of the district court is AFFIRMED substantially for the reasons spelled out in Judge Telesca's opinion below dated February 10, 1987.

ELLSWORTH A. VAN GRAAFEILAND, U.S.C.J.

ELLSWORTH THOMAS J. MESKILL, U.S.C.J.

JON O. NEWMAN, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

